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REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION,

AT THE SEPTEMBER TERM, 1879,

AND FOR THE

MIDDLE DIVISION,

AT THE DECEMBER TERM, 1879.

BENJAMIN J. LEA,
ATTORNEY GENERAL AND REPORTER.

VOLUME III.

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TAVEL, EASTMAN & HOWELL.
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

KNOXVILLE, . . . SEPTEMBER TERM, 1879.

T. R. CORNICK, JR., and other consolidated causes, *v.* DAVID RICHARDS, *et al.*

CERTIFICATE OF STOCK. *Assignment. Valid against creditors without notice to the corporation.* An assignment or transfer of a certificate of stock in a corporation, whether as collateral or in case of absolute sale, in the absence of any legislative enactment, passes the title to the assignee and is valid against the creditors of the assignor without transfer upon the books of the company or notice to the corporation.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. O. P. TEMPLE, Ch.

CORNICK & CORNICK, GEORGE BROWN, LOGAN & LUCKEY, HENDERSON & JOUROLMON, A. S. PROSSER, W. P. WASHBURN and H. COOPER of counsel.

FREEMAN, J., delivered the opinion of the court.

The contest in this case is over the question of the right of priority on the part of various creditors of Richards, who was a stockholder in the Knoxville Iron Company, as to shares of stock attached to satisfy debts due by said Richards. In one case, that of W. P. Washburn, some other additional questions, not raised as to the other parties, occur, which will be disposed of in a subsequent part of this opinion. Richards being a non-resident debtor, in most of the cases, attachments have been levied on his shares of stock in the company. The date of these liens is fixed in all the cases in the record, so that there is no question to be decided on that aspect of the cases.

In a portion of the cases Richards had obtained money from parties, and had deposited or handed over certificates of stock to such parties as collateral security, with a power of attorney authorizing a transfer of the stock and sale in case he failed to pay at maturity. In the case of the note held by Cornick, this agreement as to the stock being the collateral, is in the face of the note, and a separate power of attorney in blank is given on the back of the certificate expressing the fact of sale and transfer of the shares of stock, the blank for the party to whom sold being properly filled up to Cornick in accordance with the clear intention of the parties. Before commencement of his suit, Tuttle, the President of the company, was notified of the transfer, and requested to transfer the stock on the books of the company in

order to a sale of the stock, he being informed that it was held as a collateral. He declined to transfer it on the ground that he was advised by counsel that he ought not to do so except to an absolute owner. Thereupon Cornick filed his bill seeking to have this transfer made, and his right effectuated in payment of his debt by sale of the collateral. In addition, he alleged that the stock was only worth about twenty or twenty-five cents in the dollar, and that the amount of his collateral would not be sufficient to pay his debt. Richards being a non-resident, an attachment was prayed for and levied on $3,000 of additional stock to secure his debt. It is seen from this statement that Cornick's bill has two aspects, the one the enforcement of the collection of his debt, the other to compel the iron company to effectuate his title to his security, if necessary, in order to a sale by a transfer of the stock held by him on the books of the company. We may say here that in any view that may be taken of the question of transfer of stock as against the iron company, he has secured his priority to the pledged stock as the company had notice of his rights, and had refused to transfer the stock in pursuance of the contract between Cornick and the owner, Richards.

It has been correctly said by the Supreme Court of Indiana, in a well considered case, "that stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce, and is bought and sold in market like any

other marketable commodity." See *Commissioner* v. *Reynolds*, 13 Am. Law Reg., 380. See also an elaborate review of the authorities by Judge Dillon; Thompson National Bank Cases, *Johnson* v. *Laflin*, 331. The character of this property, as the individual property of the holder, and the distinction between it, that is shares of stock, and the property of the corporation as the capital stock paid in, or other property owned by it, is well stated by Judge Nelson in the opinion of the Supreme Court of the United States in the case of *Van Allen* v. *Assessors*, 3 Wal., 573. He says, "The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter, and for the purpose for which it was created can deal with the corporate property as absolutely as a private individual can deal with his own." This is familiar law, as he says, found in any work that may be opened on the subject of corporations.

The interest of the holder of shares of stock in a corporation is a very different thing from this corporate property. Its leading features are thus given in the above opinion by Judge Nelson. This interest of the shareholder entitles him to participate in the net profits earned in the employment of the capital by the corporation during the existence of the charter in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property held by the shareholder, like any

other property that may belong to him. Numerous cases in our State announce these principles. In fact, they scarcely need the citation of authority to sustain them; they are now universally known as elementary on this branch of the law.

It follows from this, however, that the company could obtain no advantage by refusal to transfer on demand, nor make any objection to the transfer when properly sought by an assignee of the stock, whether the assignment was absolute or as a collateral to a debt. See authorities cited, and opinion of Judge Dillon, Thompson's cases, 340. The right to sell absolutely certainly carries with it the right to charge, pledge, or assign as a security for a debt, as the greater includes the less. In a word, the company had nothing to do with the terms of the sale or assignment, other things out of the way, when regularly made between the holder and his creditor, any more than it had the right to interpose a limitation upon the use or transfer of any other property owned by him. The company acted in its own wrong in refusing to transfer on demand, and can reap no advantage to itself from or by such wrong. What ought to have been done in this case must be considered as done so far as the company is concerned.

We now proceed to the discussion of the main question presented in the case, How can shares of stock owned by an individual be assigned or transferred, and under what circumstances is the transfer complete, so as to preclude creditors of an owner who attempts to assign or does hand over the certificate

for shares of stock as collateral security for a debt, from fixing a lien upon the stock, or appropriating it by legal process to their debt?

This precise question as between creditors has not been adjudged by this court in any reported case. Certainly assuming as beyond question that the shares of stock are the individual property of the owner as any other property owned by him, it follows that the right of alienation, as an incident to the ownership of all property in this State, is complete in such owner, and no one could impose any restrictions upon the exercise of this right except by consent of the owner of the property. It is on this well established principle that by-laws of a corporation prohibiting or imposing restraints on alienation have been held inoperative as contrary to the general law of the land. See Field on Corp., sec. 110, p. 728. As a matter of course the transfer of such property in fact would depend on the nature of such property, so far as its formalities were concerned, in some of the elements held essential to the transfer of property passing from one to another, not being real estate, such as the matter of delivery, but the right to transfer would be, as we have said, untrammeled. The Legislature of the State would also, beyond question, have the power to regulate the formalities requisite to passing the title of this as well as all other property belonging to her citizens or under her jurisdiction.

So far as the nature of this property affects its transfer to an assignee, the general rule would ordinarily govern that such delivery as it is capable of

should be made to complete the transfer, and when the property itself is incapable of manual delivery, the transfer and delivery of that which represents it in form, as in case of warehouse receipts, or bills of lading, or the like, where the property is not desired or convenient to be handled, or more definitely designated. But as the Legislature has complete control over the question of the forms of transfer of property, we inquire first whether our Legislature has fixed any rule on this subject, and if so to what extent applicable, and between what parties.

The Code, ch. 2, with its sub-divisions, contains the general provisions enacted by the Legislature regulating this question as applicable to this class of private corporations. Article 4 of this chapter, entitled "General provisions in relation to private corporations," after providing various regulations for and defining rights and liabilities growing out of such corporate capacity, in sec. 1487 refers to stocks in the same, and is as follows: The stocks in all private corporations formed under this act (that is act of 1849–50, or to be hereafter created by special law) are personal property, and subject to levy and sale as such, the company in such case being required to make the proper entries in its stock or transfer book, but such sale will not relieve a stockholder from liabilities which had attached to him as such previous to the sale, neither will a voluntary sale." It seems obvious that this section can only be held to fix the character of stocks in such companies definitely as personal property, and subject it to levy and sale, as such is the

declared purpose that it shall be levied on and sold as other personal property is sold. The next clause requires the company in case of such sale to make "the proper entries in its stock or transfer book, and imposes the duty on the company of showing the transfer or sale to the purchaser by entering the stock as transferred to him by the sale, so that he shall stand on the books of the company as its owner, and be entitled to the privilege of a stockholder in said company, for we take it as to these privileges the company may only recognize the title as shown on its stock book, so far as its own dealing with the stockholder is concerned. It is proper to add here that this right, that is the right conferred on a stockholder, to the privileges of a corporator, and to vote in stockholders' meeting for direction of the affairs of the company, the election of officers and the like, is usually overlooked in the definition of the right conferred by reason of ownership of stock, yet these rights are valuable as an incident to such ownership, and cannot properly be overlooked as an element of such ownership. It may, under the charter, be the sole means by which the shareholder's voice can be made potential in the management of his capital put into the corporation, and by which the other rights usually enumerated, to-wit., the receipt of dividends during the life, and sharing the capital at the dissolution of the corporation, can be made good for the proper management of the business, and is the means of securing these against improper management, the certain or usual means

by which they are rendered valueless, or their value impaired.

But to return to the section. The next clause saves the liability of the debtor to the holder as to liabilities previously accrued by reason of the ownership of said stock, and says he shall not be relieved from them by such sale, and adds, neither will a voluntary sale, thus recognizing a forced sale by the officer by process of law providing for transfer in such case on the stock book, and also a voluntary sale, but no provision is found requiring the entry to show such sale on this book. It is insisted, however, that the succeeding section, 1491, contains a regulation of this question that is to be taken, as we understand the argument, to be equivalent to the requirements of our registration law as to sales or transfer of property therein required to be registered. In other words, until the requirements are complied with, as to all the world except probably between the immediate parties, certainly as to creditors and purchasers without notice, the sale is void.

The section is as follows: The stock books of the company shall be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid on their shares, and all transfer thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person applying.

On looking at the previous sections immediately before this, from 1488, it will be seen they are a series

of regulations fixing duties upon the officers and imposing liabilities for failures to perform such duties. For instance, fraud in failing to comply substantially with the articles of incorporation, deceiving the public as to liabilities, the division of funds, the keeping false books, make them liable to the penalties imposed. Then follows the section cited requiring the stock books to be kept as specified. It is clear from these provisions they can only be fairly construed as intended to govern the conduct of the company and its officers in their management of the business under their control, and apply solely as regulations upon corporate action, but have no reference whatever to the rights or conduct of individuals who may own shares of the stock. The section does not even accurately refer to such parties or such a subject as their right to transfer their property. The officers must so keep their stock book as to show original stockholders the amount paid on their shares, and all transfers thereof, but how the transfer or sale thus shown is to be made between the party selling and the party buying or receiving an assignment, is not attempted to be fixed, on the contrary in view of universal commercial usage, the known habits of business men in dealing with such stocks, the inference is very strong from the language, if not conclusive, that this was left as was established by general law, and the company only required to make their stock book show, or evidence by its entries, a transaction previously made, complete and executed. It could not be fairly said that the showing a fact to have occurred, to-wit., a transfer of stock

means that it is the transfer itself, that is, that the fact could not exist without this particular duty performed showed it to have been done. The sale or transfer would necessarily precede this entry of the fact on the stock book.

It would seem to follow that in order to render the sale or assignment of stock void in connection with these requirements, the Legislature would of necessity be required to have so expressed its will, a requirement so materially affecting the rights of holders of property ought at least to be directed to such holders, and in terms impose the duties upon them before they should be held affected by it. An owner of shares or a purchaser from him might read this section fixing the duties of the officers of a corporation, and never suspect that any thing was required of them by the language used in order to complete a purchase or sale of such stock. If such had been the purpose of the Legislature it was easy, and the natural mode of carrying out that intention, simply to have added, "and all transfers not so shown shall be held void as to creditors or innocent purchasers." Such language would have hardly been germane to the main purpose of the section, but would have been effective. Something is claimed in favor of the view assumed as being in accord with the spirit of our registration laws. That transfers of property recorded on official books kept for the purpose by a public officer is the policy of these laws, we know, but that a requirement that such record shall be kept in the books of a private corporation is in accordance with this we cannot very

well see. Be this as it may, the two laws are very different, the registration laws expressly making all instruments not recorded or noted as required void as to creditors or purchasers without notice. It would be a very strained construction to say the requirement of the section under consideration is equivalent to this language in our registration laws. It would be much more reasonable, we think, to say that with our system of registration, so long established, if sales or transfers of this kind of property were to be recorded at all, as notice to the world of title, they would have been required to be regularly registered, and thus the record be where all other records of the kind are found, in an official book, kept in a public office, made by a public officer under the sanction and safeguard of his official responsibility.

This argument receives considerable aid, to say the least of it, from section 1463 of art. 2 of the same chapter, regulating manufacturing, quarrying and mining corporations, which provides that "no transfer of stock is valid (that is in these companies) for any purpose except to render the person to whom it is made liable for the debts of the company as herein provided, until it has been entered on this stock book, showing to and from whom the transfer was made." This section of the Code, as well as sec. 1491, are taken from the acts of 1849–50, and embodied in the Code by the compilers, and so passed by the Legislature. It can scarcely be conceived they would have made a specific provision in the same chapter in such plain language as to certain corporations, and left the mat-

ter to inference so remote as to all other corporations of like character, or that a specific provision would have been made in one part of the chapter as to certain corporations, when in a latter portion a general provision is embodied including all private corporations of precisely the same character.

We need not notice secs. 3034 and 3035, under title executions, as they specifically refer to stock in turnpikes and railroads, and prescribe the duties of an officer levying an execution as to notice to the secretary or other officer intrusted with the books of the turnpike or railroad company. We cannot extend this to the general subject in any way without doing what the Legislature has not chosen to do.

There being no legislative regulation as to the mode of transferring title to stock in a corporation now, either by general law or in the charter in this case, we have the question to be solved on general principles of law based on sound reason and public policy. The right to dispose and transfer the title being a recognized and universal incident to ownership of property, the exercise of that right should not be trammeled by any restrictions except such as grow out of the nature of the property or the demand of a sound public policy. It is urged that from the nature of this property in stocks, and its concomitants such as being an interest issuing out of a corporation having officers and keeping books showing the issuance of its stock, which books are required to be kept in the manner we have seen by sec. 1491, that the existence of the stock or its ownership originally being shown

on these books that it ought not to be permitted to be transferred except by entries on such books. We need but say here that we can see no need for this requirement as between the parties contracting for a transfer. The books are not public records in any proper sense of our law. Why one private individual should be required to effectuate the sale of the property of another in which he has no title or interest as property by entering the fact in his books, it is not easy to see, not even if the fact be that the party selling had originally purchased the property from him. Yet this fairly represents the fact in the case of stock in a corporation. The original owner purchases it from the corporation by paying or agreeing to pay what it calls for, receiving a certificate of the fact of such purchase and ownership from the corporation. When the stock is so purchased, however, as we have seen, it is his private individual property, and he may sell it as such, or assign it with or without a consideration, and no one can object, creditors and innocent purchasers under other rules of law not being affected for reasons of public policy in case the transfer is voluntary without value paid for it. It would seem to follow that whenever the title passed out of the party himself by a fair contract of transfer, no registration law being in the case, and no fraud purposed as against a creditor of the party selling, that his right as against the property ought to end. It cannot be maintained that a mere creditor, as such, has thereby any right to prevent the free use and disposition of his debtor's prop-

erty, where no fraud intervenes or is intended against his right. The general rule being settled that the creditor can only go on the right owned by his debtor, but that his right can rise no higher, the law not in general interposing arbitrarily to create or add to the creditor's property to his benefit.

This being true, whenever the debtor has fairly sold and parted with his property, the right of the creditor as against that property ceases, and ought to cease, as a matter of course. Fraudulent conveyances and registration laws are out of the way in this argument.

In the case of *Memphis Appeal Pub. Co.* v. *Pike*, 9 Heis., 698, Keating held stock in the company and had sold it to a third party, who had received a transfer on the books of the company. The creditor, Pike, had, however, obtained a judgment in the Supreme Court at Jackson, April, 1870, while the sale by Keating had not been made until June afterward. The execution was levied on the stock by simple endorsement of the fact by the officer on it, and sold and purchased by Pike, the creditor, who filed a mandamus, after demanding a transfer, against the company, to have the fact of his ownership entered on the books, which was refused. This court held, in an opinion by Chief Justice Nicholson, after full consideration, that the levy and sale completed the title in Pike when the sale was made, and he had a right to have the transfer made on the books by the company. This case certainly settles that the title to property in stocks held by a debtor is sub-

ject to legal process, may be levied on by the officer and sold, the title transferred to the purchaser without being evidenced by an entry on the books of the corporation, no special enactment requiring it. We take it that an attachment is equally as effective to fix a lien as an execution, and its levy would impound the property as effectually as the levy of an execution. This may be considered settled. The question then recurs as to whether a sale or assignment, either absolutely or as collateral, is good against a creditor with legal process without notice to the company or transfer on its books. We have seen the transfer on the books is not required by statute.

To sustain the position that any thing is required farther than the assignment of the title by the owner, the doctrine as to the assignment of an equity is invoked. The rule seems to be well settled that an encumbrancer of equitable property may acquire a superior right over an older assignee by superior diligence giving him a claim to the protection of a court of equity. Thus, says Judge Story, a second incumbrancer on equitable property who has given notice of his title to the trustees of the property, will be preferred to a prior incumbrancer who has failed to give such notice, for the notice is an effectual protection against any subsequent dealings on the part of the trustees, so the second assignee of a residuary interest in the estate of a testator who has given notice to the executor, gets a like preference over a prior assignee. See Story's Eq. Ju., vol. 1, sec. 421*b*. In the cases cited in support of the doctrine, it is seen

to rest on the idea that the party giving notice to the trustee who has the legal title, has gone as far toward equitable possession as is possible, for after notice given, says Lord Lyndhurst, 3 Russ., 1, cited in note 2, the trustee of a fund becomes a trustee for the assignee who has given him notice, and the party has done everything reasonably practicable to prevent it being dealt with in fraud of an innocent purchaser afterward. This is all well in the cases cited, and the rule is well based on the idea that the one party having done more to perfect his title than the other, therefore has a superior claim in a court of equity. But the application of these principles is not pertinent to the case now in hand. In the cases referred to, the trustees or executor had the legal title, the assignor only an equitable one. In the case of shares of stock the corporation is not a trustee holding the legal title of the shares of stockholders. The corporation holds the legal title to the capital stock and property of the corporation, but the shares of stock belong both legally and equitably to the shareholders. The company cannot deal with nor assign or encumber the shares in any way, and have not even a *scintilla* of right in the stock, either legal or equitable, so that it would be an arbitrary holding entirely unsupported by the truth of the case, to apply the rule cited as to assignment of an equity to the different state of facts of assignment of shares of stock in a corporation. That the debtor has a legal title since our statute making stock subject to execution, would be in accordance with the settled rules of

law in our State having no exception, that only a legal title is subject to this process.

The only other ground on which it can be maintained that any thing is required to perfect the title of an assignee to stock more than a transfer of the usual evidence of such property in what is known as the rule laid down in the case of *Clodfelter* v. *Cox*, 1 Sneed, 330, that the assignment of a chose in action is not complete so as to vest the title absolutely in the assignee until notice of the assignment to the debtor, and this both as to the debtor and third persons.

This rule, thus given, though in fact a *dictum*, or at least said in a questionable form by Judge McKinney, may be admitted to be sound in reference to the case and class of cases in which it was then announced. It was the case of an assignment on the record of a judgment of the circuit court. The case was really decided on a point that precluded fairly a decision of this question, for it was a case of garnishment of the judgment debtor by process from a justice of the peace, in which the court held the proceeding did not lie, consequently the right claimed under the garnishment had no existence, and was not before the court, still the case has been followed in our State, and the rule a sound one, as applied to the assignment of a chose in action of the character then under consideration, that is, a judgment, and of notice to the debtor in such cases; and it is distinctly held that notice of such assignment must be given to the debtor. In all such cases where there is a debtor

who may be subject to garnishment, or may be involved in difficulty for want of notice, the rule is one of sound policy. In its statement, however, it only applies to cases of assignment of debts. And I may add, to such debts as are not evidenced by a writing as between the parties, such as may pass from hand to hand in ordinary transactions among business men, as open or unsettled accounts and equitable rights, such as legacies and residuary portion of estates, as in the cases cited from Story. We believe no case in our State has applied the rule to any other cases than such as we have indicated. The case of *Clodfelter* v. *Cox*, is, by Judge McKinney, in *Ins. Co.* v. *Hamilton*, 5 Sneed, 276, limited to the assignment of equitable rights and choses in action, or where the legal title did not pass, and the assignee had to sue in the name of the assignor for his use to recover the money, and his reasoning, as well as that of the other cases, implies necessarily a chose in action in the form of a debt, when notice must be given to the debtor for his protection, as a matter of course it can have no application to negotiable paper on contracts made assignable by our statute so as to pass the legal title. See *Ibid*, 277. So also it was held by this court in the case of the *Gayoso Saving Institute* v. *Fellows, et als.*, 6 Col., 472, that it was not necessary to give notice in order to effectuate the transfer where "a bond, bill or note, or like evidence of debt is assigned and transferred by manual delivery to the assignee, and this whether the legal title in the instrument passed by the assignment or not."

What acts, says Judge Andrews, will complete the

transfer of choses in action, must depend on the nature of the particular case. If the debt be represented by bill, bond or note, or other written evidence of debt, whether negotiable or not, it would ordinarily be sufficient to deliver the instrument to the assignee at the time of the assignment. If the assignor of the bond or note has delivered the instrument to the assignee, he has done all in his power to signify his intention to part with control over it, and this act as completely denudes the assignor of the *indicia* of ownership as delivery in case of a personal chattel.

If this view be sound, it seems clear that the assignment and delivery of certificate of stock being the *indicia* of ownership delivered by the corporation to the owner, should be equally as effective, nor can we see how the assignee could ever sue or be required to sue in the assignor's name to recover on his stock. It does not carry with it, and is not evidence of a debt or contract to pay. This being so, can the rule of notice find any proper application to the case of assignment of shares of stock? In the first place this is not like a judgment, open account, or an equity. The evidence of the debt in such cases does not exist in such form as that it may be transferred, the judgment is on the docket of the court, the open account has never been liquidated or signed by the party to be charged, exists only on the books of the creditor or in legal obligation. Here there is an agreed evidence of the right, one signed by the parties from whom it is received, that is the corporation, properly

authenticated and given to the shareholder as the accredited evidence of this property, which, in fact, has only a legal existence, consisting in certain rights evidenced by the paper, growing out of the fact of his having purchased from the company his shares. There is no analogy between this stock and a judgment or open account, nor can it be called an equity in the sense of having obtained a right which must be sued for in the name of another who has the legal title. The assignor transfers all the title he has, and that is a complete legal title. The company that issued it has no legal title in trust for him. In a word, it is a right of a peculiar character, but still one existing in contract, evidenced by the certificate, at least this is as good evidence of it as any other, and it is issued by the company for this very purpose, and so accepted by the party. This certificate, we know by universal usage among parties accustomed to deal in such securities, is recognized as the evidence of right and ownership, and passes by such usage from hand to hand by such assignments as are before us as readily as a negotiable note by endorsement. Again the rule applies to a case of a debtor, for the notice, by the very term of the rules, is to be given to the debtor. It certainly cannot be maintained that the corporation is a debtor to the shareholder in the amount called for in his share. This has never been held, and we know is not the fact, so that the rule can have no application on this basis, but its application is repelled. It cannot be said to be an equity in the sense of assignment of one as given by Story and

the authorities referred to, for these the assignment is to be strengthened and perfected by notice to the trustee or holder of the legal title. Here the corporation does not hold the legal title, is not a trustee for it. Now, unless we insist on an arbitrary application of the rule where the facts do not meet its requirements, in fact cannot be brought within it, it is impossible to say the principle discussed can have any rightful control over the question. We have no debtor, no trustee to be notified. A notice to the corporation on either of these principles may just as well be given to any other person or corporation as to the corporation issuing the stock. Where both the terms of a rule of law, as well as its reason and purpose, fail of application to the case in hand, it would be doing violence to all the established principles of our jurisprudence to say the rule should be applied, and such is the case before us.

The only other aspect of the case that need be considered is, what is the soundest public policy, and what the rule that will best subserve this end?

We may say here that authorities most respectable may be found in support of either view that may be desired on this question. But as no statute of one State establishes a rule, and no authoritative adjudication has been made as a precedent, we are at liberty to adopt the rule which commends itself to our judgment as best, all things considered, and give it due sanction of our authority for the guidance of our people and courts.

In adopting a rule as to the transfer of this pe-

culiar kind of property, we should look to the nature of the property, the uses to which it is put in the transaction of the business of the country, and at the same time not be unmindful of the established habits of dealings with the same among business men, this last should have an influence in this question of full weight, because we may be assured that what has been universally agreed on and established as the custom of such merchants, is the result of a felt need that has been met by the keenest practical sagacity dealing with the question.

It is true our State is comparatively an agricultural one, but still in our business centers this species of property is as much used in the transactions of the market as in any other State, in proportion to the amount of such property held by our citizens. In addition, we must not forget that we are laying down a rule not alone for to-day, but for the future, with all its development of our resources, agricultural, mining and manufacturing, and this development must inevitably bring an immense commerce in the handling of its products.

We know, as a matter of well accredited current history, that stocks are used every day in the transactions of our business men as collaterals, as well as sold, and that the universal practice is to transfer or assign the certificate of the stock with a power of attorney in blank to be filled up, authorizing a transfer by the corporation on its books to the purchaser on the presentation of which power, properly authenticated, the corporation transfers the stock to the purchaser or

holder, and when the sale is absolute it is usual to issue new certificates to the party, taking up the old. Such a practice facilitates the easy use of this property in commercial transactions. The requirement that the title could alone be transferred on the books of the corporation, or by notice to the corporation, would greatly tend to trammel this use, and, as far as we can see, notice to the corporation can serve no practical end, and has no appropriate place in the transaction, so far as passing the title from a holder to a purchaser, or the right of a creditor as to a purchaser, for he can, as he will always do, protect himself by requiring an assignment of the certificate, and then a transfer on the books of the corporation. The rule requiring transfer on the books of the corporation can only serve to give a creditor who has a judgment or attachment a legal advantage who has never given credit on the faith of the stocks, over the other who has advanced his money on them and taken the evidence of his security by a transfer of the certificate. In such cases alone will the contest be likely to arise, as the party who intends to trust to the security of such property will always take the assignment. In such a contest the equities are altogether in favor of the assignee who has advanced his money on the faith of the collaterals.

The well settled rule of law as to symbolic delivery of the representative of the thing sold is in accord with the views maintained in the above opinion. Indorsement of a bill of lading is held a good delivery in performance of a contract of sale, so as to

defeat any action by the buyer against the vendor for non-delivery of the goods. See cases cited, Watts Act. & Def., vol. 5, 578, Assignment of warehouse receipts and a gin receipt for cotton to be ginned and baled, was held in Arkansas to pass title to the cotton free from the landlord's lien for rent. *Ibid* and cases. The reason of the rule is given by the Supreme Court of Illinois in the case of *Broadwell* v. *Hurard*, 77 Ill., 305, cited by Wait as above, that "usage has made the possession of such documents equivalent to the possession of the property itself." The case is much stronger in favor of the certificate of stocks where they are the sole representative of the property held by the owner, and where the property has no substantial existence, and therefore is incapable of manual delivery. We believe, in popular and commercial language, when stocks are spoken of, this certificate is what is always referred to, and this certificate the universally accredited evidence of the ownership of such property. A holding that would overturn all this should only be made, for the most imperative reasons, or in obedience to a statute enacted by the law making power of the State. It is proper to add that as a matter of course we do not hold these certificates negotiable, or that any of the incidents of such character goes with them by assignment, so that the assignee must take subject to previous equities as any other assignee standing in the shoes of his assignor. We only hold that the title passes and is completely transferred, whether in case of collaterals or an absolute sale, so that a creditor who has fixed no liens

on it before cannot appropriate it to his debt and override the title of the purchaser who has, in good faith, obtained a regular assignment of the certificate of stock under a valid contract between himself and the owner.

The above conclusion will serve to guide counsel in drawing the decree in this case, as the date of levies will fix the priorities of the parties respectively.

The case of the assumed transfer of stock to Mr. Washburn presents another question. The facts are as stated in his answer and an agreement, that before filing some of the bills, the precise time not necessary to be shown, Richards assigned two certificates of shares of stock of considerable amount to Washburn, Washburn agreeing to furnish Richards a certain sum of money, or rather to pay the same for his benefit. It is also admitted that he has not advanced any money on said shares of stock. It amounts only to this, Washburn agreed with Richards to advance certain money—how much is not shown—for his benefit, and the stock was assigned to him as security when this was done. Not having done so, nor even, as far as we can see, contracted any liability to any third party on the faith of this stock, we do not see how he can claim as against creditors of Richards, or even against Richards himself, to hold the certificates. The contract has not been completed so as to fix his right, and he holds the stock simply as a volunteer, liable to the attaching creditor so far as he is concerned. His right was to accrue when the money was advanced.

It was a contract for a security on a contingency that has not occurred.

The cost as between Cornick and the Iron Company, of filing his bill, will be paid two-thirds by the company, one-third out of the fund. The costs of the other creditors appropriating the fund to their debts will be paid out of the fund arising from sale. A decree will be drawn in accord with this opinion.

McFARLAND, J., delivered the following dissenting opinion:

It is not my purpose to enter into a full discussion of the question involved in these causes, but in view of the fact that the question is unsettled in this State, and of the first importance, I deem it not improper to state briefly my conclusions.

It is important that we adopt rules in regard to the transfer of stocks as near in accord with the rules generally prevailing in this country as we can consistently with such positive enactments as our own Legislature has adopted, so as to place stocks in our incorporated companies as near as possible upon a like footing with others in the general stock markets. Upon questions of this character general uniformity is desirable, though often not attainable.

By our statutes the officers of the corporation are required to keep stock books, which shall show the names of the stockholders and the stock owned by them, and make the proper entries showing the transfer of stock. These books are open to the inspection of any one applying, although the corporation be

strictly a private one, and the stock is made subject to levy and sale by execution, the officers of the corporation in such case being required to make the entry showing the transfer in pursuance of the execution sale. How far do these provisions charge the general principles of law upon the subject? These acts do not in terms say that all transfers of stock not entered upon the books of the company shall be void as to creditors, and therefore I am of opinion that they should not be construed as having that effect. To so hold would prevent the transfer of stocks as collateral security, for it is doubtful whether the assignee in such case has the right to have the stock transferred to him upon the books of the company, and if he do so, the result is that the original stockholder is released and the assignee becomes liable as a stockholder in favor of creditors. *Germania National Bank* v. *Case, Receiver*, 96 U. S. R. But the transfer is not in all respects complete so as to constitute the assignee a member of the corporation, and entitled to act as such in stockholders' elections or otherwise, until the transfer be properly entered upon the stock books. The assignee, however, may acquire a right and beneficial interest in the stock, although the transfer be not thus complete. A transfer of the stock by assignment and delivery of the certificate or other means evidencing the contract ought to be good between the parties so as to give the assignee the right as between them. The question then recurs, can such transfer be made effectual as to creditors, and if so, whether notice of the assignment is neces-

sary to perfect the assignee's right? We have, in this State, adopted a rule upon the subject at variance with the weight of American authority, but in accord with the English rule, that is to say, an assignment of a mere chose in action (that is other than negotiable or assignable paper) is not complete in itself so as to vest the title absolutely in the assignee until notice of the assignment to the debtor, and this not only as regards the debtor himself, but likewise as to third parties who may acquire rights. The leading case on this subject is *Clodfelter* v. *Cox*, 1 Sneed, 330. The question is whether the assignment of stocks stand upon this ground, or does a different rule apply? In some respects stocks resemble ordinary choses in action, in other respects they are unquestionably different, and *sui generis*. They are not in the nature of debts against the corporation. The corporation is not in the attitude of debtor to the stockholder, and notice of the assignment given to the corporation is not in all respects identical in its purposes and effect to notice given to a debtor of an assignment of a debt due from him. Still, certificates of stock are not negotiable, and their assignment, as we have seen, does not vest the assignee with an absolute title so as to constitute him without more a member of the corporation with the full rights of a stockholder. It is, therefore, an incomplete assignment or transfer, and it is in some respects in the nature of an ordinary chose in action. That is to say, while it is personal property it is not a chattel capable of actual manual delivery from one person to another, it is a mere

right, incorporeal in its nature. It is not a title to any part of the property of the corporation, but a mere right growing out of the organization. The certificate of stock, it is true, is legitimate evidence of the right, but so also is a certified transcript of a judgment at law evidence of the right of the plaintiff in the judgment. A duly certified copy of a will would be legitimate evidence of a legacy, and other instances might be given of similar papers which are conceded to be legitimate evidence of mere choses in action, but their transfer does not vest the assignee, without more, with a perfect right to the thing assigned. As has been said, negotiable paper, or paper assignable so as to authorize the assignee to sue and recover in his own name, stands upon a different footing; as to these the assignment or transfer of the paper is complete in itself. To which class shall certificates of stock belong? It is very obvious that in these States which have not adopted the English rule, the question is wholly different, as the transfer is complete in itself, even conceding it to stand as other mere choses in action, for no notice is necessary in any such cases. But as we have adopted the English rule, shall we apply it to transfer of stock, or shall we place them upon the footing of negotiable or assignable paper, or shall we, while admitting that they do not belong to this class, make them an exception to the general rule requiring notice, and adopt a rule applicable to stocks alone growing out of the peculiar character of these securities? We have no positive legislation in terms adopting either course, and the

difference between stocks and other ordinary choses in action are such that a distinction might be made as to their transfer, and a different rule adopted, founded upon the difference in the nature of the property, but looking to the spirit of our legislation as well as the inconvenience of adopting too many exceptions to general rules, I think it best to make no exception, and apply the rule of *Clodfelter* v. *Cox* to this as well as other choses in action. While our acts do not in terms declare all transfer of stock not entered upon the books void as to creditors, still it is manifest that the rights of creditors were had in view first, the stock books, although the corporation be private, are required to be kept open to the inspection of any one applying. This may have been intended to afford the public dealing with the corporation the opportunity to inform themselves of its solvency and condition, but it is also probable that it was intended to give to creditors an opportunity by this means to ascertain whether or not his debtor owns stock. But in addition to this our legislation is, upon this point, positive, that is, the stock is subject to levy and sale by execution. This is a radical innovation upon the rule generally applicable in such cases, for without this positive legislative act a mere right or chose of this character could not be subject to levy and sale by execution. Now, to make the transfer of stock by secret assignment and delivery of the certificate without more, absolutely perfect and complete, would, in a great measure, if not entirely, defeat the right of the creditor to reach it by execution; for it would be

most difficult, if not impossible, to find the stock, and the levy and sale would be generally delusive, and lead to other complications and litigation. It is true that these difficulties would not be altogether obviated by mere notice to the corporation. The corporation not having any special interest in the transfer, and there being no positive law requiring the officers to keep a record of such notices, it might not always be a protection to others, or enable the debtor to know to whom the stock belonged. It is further true that notice to the corporation is not necessary to protect it as in case of a debtor, .or at least not for the same reason, but such notice would be a good excuse for its failing or refusing to transfer the stock to a subsequent assignee, or make the corporation liable for an unauthorized transfer, and it would also afford some means, imperfect though it be, to the creditor by which to ascertain if his debtor has transferred his stock. and again, it is apparent that in cases of ordinary choses in action, notice to the debtor is not always a protection to subsequent assignees or attaching creditors, it simply furnishes a certain rule by which their rights are to be determined. Further, having adopted the English rule, it is better to follow it out to its legitimate results upon the reasons upon which the rule is founded, that is, in case of the transfer of rights of this character, where actual possession cannot accompany the transfer as evidence of the ownership, such rules ought to be adopted as will require the assignee to go as far toward asserting and exercising his right as the nature of the property is susceptible of.

That is, in case of an ordinary chose in action, notify the debtor, or where an equity is assigned, notify the trustee, or in a case of this character notify the corporation, through whom the right is to come. In other words, the reason of the rule grows largely out of the nature of the property, or right to be transferred; that is to say, it is not a chattel capable of delivery as such, and in this respect stocks are identical in their nature and character with ordinary choses in action, to which the rule is conceded to apply. It appears that where the English rule has been adopted by other States, they have applied it to stocks.

I concede the importance of making the transfer of such securities as free as possible consistent with the spirit of our own laws, especially in view of the large traffic carried on upon this basis in the large money centres and stock markets, and if we look alone to the policy of encouraging the trade and commerce based upon these securities, and removing all obstacles in the way of such transfers, and conforming to the rules of the stock-jobbing commercial world, then it is manifest that these ends would be best accomplished by making the transfer and assignment of the certificate complete in itself, not only between the parties, but as to all the world. But on the other hand it seems to me that such a rule would in effect render nugatory the positive provision of our statute making stocks subject to levy and sale under execution. And to this provision of our statute we must give effect. We should not adopt a construction that practically renders it nugatory. But for the fact that we

have in this State adopted the rule laid down in the case of *Clodfelter* v. *Cox*, and the fact that our statutes make stocks subject to levy and sale by execution, I should concur in the opinion of the majority as the better view of the question, and more in accord with the rules prevailing elsewhere in the United States, but for the reasons stated I am constrained to dissent.

COOPER, J., delivered the following dissenting opinion.

This case involves the relative rights of an assignee, by purchase or as collateral security, of stock in a corporation, and of the attaching and execution creditors of the assignor, who have levied on the stock.

Stock in a corporation, the property of an individual stockholder, is in the nature of a chose in action. *Union Bank* v. *State*, 9 Yer., 500; *McLaughlin* v. *Chadwell*, 7 Heis., 408; *United States* v. *Cutts*, 1 Sumn., 145; *Rex* v. *Capper*, 5 Price, 217; *Erwin* v. *Oldham*, 6 Yer., 185. A certificate of stock is only evidence of the ownership of the shares mentioned therein. *Shropshire Union Ry. Co.* v. *The Queen*, L. R. 7 H. L., 509; *Mechanics Bank* v. *N. Y. & N. H. R. Co.*, 13 N. Y., 627. Neither its assignment nor the assignment of the stock itself verbally, or in writing not on the books of the company, although it may be a valid sale, passes the legal title, but only an equity which, however, like the right acquired by the assignment of a chose in action proper, will be recognized and sustained both at law and in equity. *Mount Holly Co.* v. *Ferree*, 2 C. E. Green, 117; *Bank*

of Utica v. *Smalley*, 2 Cow., 770. Such stock is now, by statute, declared to be personal property, and leviable by execution and attachment. Code, secs. 1487, 3097.

In this State we have adopted the English rule that to perfect the right of an assignee of a chose in action, the title to which does not pass by delivery, as against a subsequent assignee or creditor of the assignor, notice must be given to the debtor. *Clodfelter* v. *Cox*, 1 Sneed, 339; *Catron* v. *Cross*, 3 Heis., 584; *Allen* v. *Bain*, 2 Head, 108; *Carrigan* v. *Leatherwood*, 3 Leg. Rep., 137. The principle upon which these decisions rest is, that the assignee must do some act in reference to such species of property which will be equivalent to the transfer of possession of personal property, the object in the requirement being to protect innocent third persons, and, it may be added, to secure the rights of creditors. The rule has been extended by analogy to assignments of equitable interests in estates, real or personal. *Foster* v. *Cockerell*, 9 Bligh, 332. And to assignments of stock in a corporation or joint stock company. *Martin* v. *Sedgwick*, 9 Beav., 333; *Union Bank of Manchester ex parte*, L. R., 12 Eq., 354; *Pinkerton* v. *Manchester etc. R. Co.*, 42 N. H., 424; *Sabin* v. *Bank of Woodstock*, 21 Vt., 353; *Shipman* v. *Ætna Ins. Co.*, 29 Conn., 245.

The practical wisdom of this rule commends itself to our good sense, is in strict accord with the principles of our registration laws, and seems absolutely essential to the rights of execution and attaching creditors under our Code. If the rule were otherwise,

an execution would lead to litigation, not satisfaction. The law would keep the word of promise to the ear, and break it to the hope.

3L 36
11L 703

STATE v. MATHES & MILLS.

CRIMINAL LAW. *Wantonly defacing or injuring a dwelling house. Indictment.*

In an indictment under section 4652 of the Code, for wantonly defacing or injuring a dwelling, the ownership of the property may be laid in the person in possession.

FROM HAWKINS.

Appeal in error from the Circuit Court of Hawkins county. N. HACKER, J.

ATTORNEY-GENERAL LEA for the State.

No counsel marked for defendants.

FREEMAN, J., delivered the opinion of the court.

These indictments were quashed in the court below, and the State appeals. They charge the parties with wantonly defacing and otherwise injuring the dwelling house owned by —— —— but occupied at the time by C. C. Spears as a dwelling house, by throwing

rocks, sticks and other missiles through the windows of the same.

The indictment was quashed because it failed to state the name of the owner of the house. Section 4652, Code, makes it a misdemeanor to wantonly injure, deface or disfigure any building or fixture attached thereto, or the inclusures thereof, belonging to the State, or any county, city, town, or to any other person.

We think the question of ownership, that is, the legal title, is of very little importance as an element in this offense. It is the wanton injury to property of this kind that is intended to be punished, and this wrong, perpetrated against the possession of the party in this case, is as great as if it had been averred to have been done against the party having the legal title. The words "or to another person," in the statute, is simply intended to include injuries done to private property, in addition to those that might be perpetrated against the designated public property specified in the previous part of the statute. We think the allegation of temporary occupation as a dwelling in this case, is a sufficient statement of ownership under the statute.

Let the judgment be reversed and the case remanded for further proceedings.

3L 38
14L 467
14L 474

THE STATE *v.* JAMES WISE.

CRIMINAL LAW. *Perjury. Indictment.* In an indictment for perjury, which is assigned upon the swearing of the defendant as a witness in a criminal case, it need not be alleged that the case in which the false-swearing occurred was by indictment or presentment; it is sufficient if it avers that the court had jurisdiction of the issue.

FROM KNOX.

Appeal in error from the Criminal Court of Knox county. M. L. HALL, J.

ATTORNEY-GENERAL LEA for the State.

W. L. LEDGERWOOD for Wise.

McFARLAND, J., delivered the opinion of the court.

This indictment charges the defendant with perjury, which is assigned upon his swearing as a witness "in a certain lawsuit or trial wherein the State of Tennessee was plaintiff and Thomas Gilson was defendant, pending before the Criminal Court of the district of Knox county, * * which said suit or trial was within the jurisdiction of said court, * * in which trial it became material to enquire whether Thomas Gilson was guilty of carrying a pistol under the laws of the State of Tennessee."

The cause of demurrer, which was sustained by the court, was, that the indictment does not show whether the cause against Gilson, in the Criminal Court

of Knox county was by indictment or presentment. In *Steinston* v. *The State*, 6 Yer., 531, the omission of the indictment to charge that the matter of traverse for assault and battery in which the false swearing occurred, was by presentment or indictment, was fatal—the court saying that it did not necessarily appear from the indictment that the court had jurisdiction of the issue. It is to be observed that in the present case, while the indictment does not show whether the case pending against Gilson was by indictment or presentment, it does in terms aver that the court had jurisdiction of the cause.

The law upon this subject has been (since the case of *Steinston* v. *The State*), materially changed by the Code. It is sufficient to charge the facts in ordinary and concise language, without prolixity or repetition. Code, 5114. In an indictment for perjury it is not necessary to set forth the pleadings, records or proceedings with which the oath is connected; it is sufficient to give the substance of the controversy or matter in respect to which the offense was committed, in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of its falsity. Code, 5129, 5130.

Under these provisions, we think the indictment is sufficient, it being averred that the court had jurisdiction of the case against Gilson in which the false swearing is alleged to have occurred.

Reverse the judgment.

3L 40
1pi 426

HAMBRIGHT *v.* THE CLEVELAND NATIONAL BANK.

NATIONAL BANKS. *Usury.* A bill to recover usury cannot be maintained against a National Bank. It is not subject to the laws of the State upon that subject, except so far as Congress may see proper to permit.

FROM BRADLEY.

Appeal from the Chancery Court at Cleveland. W. M. BRADFORD, Ch.

J. N. AIKEN for complainant.

P. B. MAYFIELD for defendant.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to recover usury alleged to have been paid within the last six years. A demurrer was filed, on the ground that the party could only sue for and recover under the 34th section of the National Banking Act as therein provided, and that National Banks were not subject to the regulations of the State on this subject. The Chancellor overruled the demurrer on these points, but sustained it on another, to-wit: that the defendant could not be called on to make a discovery that would expose it to penalties for violations of law. Both parties appealed.

We have heretofore held as ruled by the Chancellor on the first question and our court has taken jurisdiction of such question. See case of *Steadman et als.* v. *Redfield & Co.*, September Term, 1874. The

case of *Farmers and Mechanics Bank* v. *Dearing*, 1 Otto, 91, U. S. R., had not then been decided. This case distinctly holds the contrary doctrine to that laid down by this court. The syllabus of that case is as follows: "The provisions of the National Banking Act imposing penalties upon National Banks for taking usury, supersedes the State laws on that subject. That National Banks organized under the act are instruments designated to be used to aid the Government in the administration of an important branch of the public service; and Congress, which is the sole judge of the necessity for their creation, having brought them into existence, the States can exercise no control over them, nor in anywise affect their operation, except in so far as it may see proper to permit."

This being a federal question over which the Supreme Court of the United States has jurisdiction, we are compelled to yield to the authority of that court, and do so—notwithstanding our previous holding to the contrary.

The result is, that the decree of the Chancellor is reversed, the demurrer sustained on the ground stated, and bill dismissed at the cost of complainant, in this court and court below.

8L 42
8L 504

A. N. FOSTER *v.* LOOKOUT WATER COMPANY and M. & A. OF CHATTANOOGA.

PRACTICE AND PLEADING. *Action.* The plaintiff sued a city and water company for the loss of his house by fire, and averred, in his declaration, that the water company owned the water works, pipes, etc., and the city controlled a fire department, and was in duty bound to use all means at command to extinguish fires; that, by contract with the city the company undertook to furnish water to extinguish fires; that a fire occurred near plaintiff's house, and extended to and consumed it; that defendants, at the time, had permitted the pipes to get out of repair and become full of mud and gravel, whereby, etc. Held, upon demurrer, that the declaration shows no cause of action against either defendant.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. JOHN B. HOYLE, J.

E. M. DODSON for plaintiff.

KEY & RICHMOND and C. H. B. CASE for defendants.

COOPER, J., delivered the opinion of the court.

The plaintiff, whose house in the City of Chattanooga was destroyed by fire on the 26th of July, 1877, brought this action to recover damages for its loss, and, a demurrer to his declaration having been sustained, appealed in error.

Under the Code, as at common law, a declaration, to be good, must state facts showing a substantial cause of action. Code, sections 2881, 2884. The declaration

in this case contains three counts. The second count says that the plaintiff sues the defendants for unskillfully constructing their water mains, pipes and fire plugs, which they had undertaken to do, and for negligently permitting them to become obstructed, in consequence of which unskillfulness and negligence, plaintiff's house was destroyed by fire. The third count is, that the defendants, by their charter and contract, were bound to properly put down and keep in repair such appliances as they had for the extinguishment of fires, yet negligently permitted such appliances, their water-mains, pipes and fire plugs, to become obstructed, whereby plaintiff's house was destroyed by fire. Neither of these counts states any facts from which it can be seen that the defendants were bound, either by duty or contract, to the plaintiff.

The first count avers that the Lookout Water Company is a corporation chartered by the laws of Tennessee, the owner of certain water-works, consisting of a reservoir, water-pipes, mains, water-plugs, fixtures, machinery, etc., located in the city of Chattanooga, the pipes being laid in the public streets and alleys of said city, which property is used by said company for the purpose of supplying the city of Chattanooga and the inhabitants with water, not only for ordinary use, but also for the extinguishment of fires, and the protection of the property of the inhabitants of said city from fire. That the defendant, the Mayor and Aldermen of the city of Chattanooga, is a municipal corporation under the laws of Tennessee, the owner of the streets and alleys in said city, and, as such corpora-

tion, has control of certain fire companies, fire engines, hose and carriages, etc., suitable for the extinguishment of fires, and, under the laws of the State and its charter of incorporation, is authorized, and it is made its duty to use all means at its command to prevent and extinguish fires, and to protect the property of its inhabitants from fire. That the water used in the extinguishment of fires is conveyed and made available by the use of certain mains, pipes and stationary plugs, "the property of defendants." That before the injury complained of, a contract had been made by and between the defendants, under which the company, for a certain consideration, undertook to furnish water at suitable places and in sufficient quantities to extinguish fires whenever they occurred within the fire limits of said city. That under and "by virtue of the charters of said defendants and of said contract," it was the duty of the defendants to keep the fire-plugs in good order and the mains and pipes open. That on the 26th of July, 1877, a fire occurred "near to" the dwelling house of plaintiff in said city, and "extended to and consumed said house." That, at the time, the defendants had suffered the mains, pipes and plugs to get out of repair, and the mains and pipes to become full of mud and gravel, so that when the fire occurred no water could be procured for its extinguishment, whereby, etc.

This count, it will be noticed, does not set out the provisions of the charter of the city of Chattanooga nor the stipulations of the contract between the defendants, upon which their alleged duty is assumed to

rest. It deals in conclusions or inferences, not in facts from which the court can draw its own conclusions. But, conceding that it rests the liability of the defendants upon the charter of the city and the contract between them by sufficient averment of facts, the declaration, "by a fair and natural construction," shows that the mains, pipes and plugs were the property of the Lookout Water Company. The city only has a contract with the company by which the latter is to furnish water in sufficient quantities to extinguish fires. The cause of action is in suffering these mains, pipes and plugs to get out of repair, and the mains and pipes to become filled with gravel and mud, so as to obstruct the flow of water. The duty of repairing and keeping open is *prima facie* in the owner of the property. The duty of the city, as the declaration states, is "to use all means at its command" to prevent and extinguish fires. But the only means shown by the declaration to be at its command are the "fire companies, fire engines, hose," etc., under its control, and the water when supplied by the company. There is no averment that the city failed to use these means to the best advantage. And the general charges against the defendants are the inferences of the pleader from the facts. In this view, one cause of demurrer assigned on behalf of the city, that the declaration shows that the Water Company owned the pipes, etc., and does not show that the contract permitted the city to exercise any control over them, is well taken.

One of the learned counsel of the plaintiff rests his client's right of recovery upon "a tortious breach of

contract," meaning the contract with the city. The other upon the unskillful and negligent performance of a duty imposed or authorized by its charter. If it be conceded that the declaration does show a stipulation in the contract between the company and the city by which the company was to furnish water to extinguish fires, and a breach of that contract by negligently allowing its pipes to become obstructed, there is no averment that this stipulation of the contract was to enure to the benefit of any citizen aggrieved, or that the contract had been assigned to the plaintiff. The third cause of demurrer, that the declaration does not show that the plaintiff is a party, privy or assignee of the contract, is, therefore, so far as this aspect of the case is concerned, well taken.

For another reason, even if the city itself were suing, there could be no recovery for the damages sought upon a breach of the supposed stipulation. By the law of this State, damages for breaches of contract are only those which are incidental to, and directly caused by the breach, and may be reasonably supposed to have entered into the contemplation of the parties, and not speculative, accidental or consequential damages. The contract itself must give the measure of damages, and if it fails to do so, the damages can only be nominal. *State* v. *Ward*, 9 Heis., 100, 132, and cases there cited. The stipulation in question, conceding it to be as claimed, was to furnish water in sufficient quantity to extinguish fires. The measure of damages for the breach of this stipulation, under the rule that the contract must give the measure.

would be, at most, the value of the full quantity of water which ought to have been supplied at the time, not the accidental, speculative, or consequential damages occasioned by a fire, which the company never stipulated to put out, nor, *a fortiori*, of a fire which "extended to" plaintiff's house.

If we place the right of recovery upon the negligent performance of a duty, the difficulty will be to connect any duty arising out of the stipulations of the contract between the city and company with the plaintiff, or the particular loss sued for. The stipulation is to furnish water. The company has not stipulated to extinguish fires. It is not averred that the plaintiff had the means of using the water for the extinguishment of the fire. Hence, to use substantially the words of an eminent Court, whatever benefit the plaintiff would have derived from the water would have come from the city through its fire department. The most that can be said is, that the company was under obligation to the city to supply the fire plugs with water; that the city owed a public duty to the plaintiff to extinguish the fire; that the fire plugs were not supplied with water, and so the city was unable to perform its duty. We think it clear that there was no contract relation between the plaintiff and the company, and consequently no duty which can be the basis of a legal claim. Per Park, C. J. of Supreme Court of Connecticut, in *Nickerson* v. *Bridgeport Hydraulic Co.*, 46 Conn.; S. C. 8 Rep., 427.

Such a stipulation as the one in controversy cannot be construed as turning the Water Company into a

public officer, or a contractor engaged to perform the duties of a public officer, who is liable in damages for negligence to any one sustaining special injury in consequence thereof. *Robinson* v. *Chamberlain*, 34 N. Y., 389. There is no such public office known to our laws as the supplying water for the extinguishment of fires.

There are notoriously some branches of the law, the underlying principles of which are so unsteady, and the rights involved so complicated, that the courts must be content to deal with special cases as they arise. This is notoriously the case, as the Judges of the highest court of the land have often had occasion to say, with the subject of State taxation in the matter of foreign and domestic commerce. The liability of a municipal corporation for certain classes of torts is another. "All that can be done with safety is to determine each case as it arises." Per Foote, J., in *Lloyd* v. *Mayor of N. Y.*, 1 Seld., 375. The inclination of the courts has been not to press the pecuniary liability of municipal corporations, which is distinctly recognized where the duty is a corporate one, absolute and perfect, and owing to an injured party, to cases where a duty is assumed not for the corporate benefit, but the common good. They have refused to hold a city liable for the acts of its police officers although they are appointed by it; or for the acts or negligence of its agents and employees in charge of patients in a public hospital; for the misconduct of the members of its fire department; or for the city's own neglect to provide suitable engines or fire appa-

ratus, or to keep in repair public cisterns, or continue the supply of water to particular hydrants. Dill. Mun. Cor., sections 723, 774, 775; *Tainter* v. *Worcester*, 123 Mass., 311; *Lansing* v. *Toolan*, 37 Mich., 152; *Wheeler* v. *Cincinnati*, 19 Ohio, 19. The reason is, that the hazard of pecuniary loss might prevent the corporation from assuming duties, which, although not strictly corporate nor essential to the corporate existence, largely subserve the public interest. The supplying water for the extinguishment of fires is precisely one of those acts which bring no profit to the corporation, but are eminently humanitarian. To hold a city responsible for the loss of a building, or of whole streets of houses, as sometimes happens, because it might be thought, or because in reality some of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk. Be this as it may, the present case, as made by the declaration, falls under no class of recognized liability.

Affirm the judgment.

81 50
11L 239

JESSE C. ROBERSON, EX'R *v.* ELIZA C. ROBERSON *et al.*

CHANCERY PRACTICE AND PLEADINGS. *Administration. Receiver. Supersedeas.* An order of a Chancellor, made in the progress of a cause, involving the administration of an insolvent estate, appointing a receiver to take the assets out of the executor's hands upon it being made to appear to the Chancellor, that the assets are in danger of being lost or wasted, is within the power of the Chancellor and cannot be superseded by this court, under section 3933 of the Code.

FROM SEQUATCHIE.

MOTION TO DISCHARGE SUPERSEDEAS.

DEWITT & SHEPHARD for complainant.

HYDE & BROWN, SPEARS & SPEARS, KEY & RICHMOND and S. J. A. FRAZIER for defendants.

McFARLAND, J., delivered the opinion of the court.

The complainant, as the executor of the will of Samuel W. Robersón, deceased, filed his bill for a construction of the will and the settlement of the estate in the Chancery Court as an insolvent estate, making the legatees and creditors parties. An order was made appointing complainant also receiver of the rents of the real estate. The bill was filed September 6, 1878. At the March term, 1879, a number of the creditors and legatees appeared and moved the court for the appointment of a receiver to take charge of all the assets of the estate, upon the ground "that the executor had been guilty of habitual drunkenness;" "that

he was wasting the assets of the estate;" "that he had converted a considerable portion of the estate to his own use;" had sold the property for less than he might have obtained for it; had bid at his own sale; sold property without requiring payment or note; that he had been paying out the assets to creditors since the suggestion of insolvency. The motion was thereupon heard, and the decree shows that it appeared to the court from the affidavits of certain persons named, which were on file, and from the record, that said executor had violated his trust and was jeopardizing the property and funds of the estate, the motion was therefore sustained and a receiver appointed, and the executor enjoined from further acting, except to pay a certain specified sum to the widow, and he was ordered within twenty days to turn over the assets to the receiver, who was authorized to act, upon giving bond with surety.

Within the twenty days said executor presented his petition, accompanied by a transcript of the record, (which, however, does not purport to be complete), to one of the judges of this court, and obtained his fiat for a *supersedeas*, which was issued, superseding the above order of the Chancellor. The motion is now made to discharge the *supersedeas*. Our recent holdings have been that the power given to this court and its judges by section 3933 of the Code, to supersede the orders and decrees of inferior courts, does not authorize us to supervise the discretion of a Chancellor in the exercise of a conceded power for the protection of property *pendente lite*. *Bramly* v. *Tyre*, 1 Lea, 531.

The power conferred on the court by the statute is to supersede such interlocutory orders and decrees, or execution thereon, "as in case of a final decree," that is, such orders and decrees as it would supersede upon granting a writ of error upon a final decree. The orders and decrees which would be superseded are such as adjudicate rights and admit of active execution. The appointment of a receiver is ordinarily in the nature of granting extraordinary process, for it neither settles or prejudices rights, and is only resorted to for the purpose of preserving the property pending the litigation, for the benefit of the successful party. *Baird* v. *Turnpike Co.*, 1 Lea, 394. "It might be otherwise," says Judge Cooper in the case last referred to, "if the appointment was not within the competency of the court, as when the contest is over the legal title to land or does not extend to the rents, for then it would affect possession, which is itself a right;" referring to *Richmond* v. *Yates*, 3 Baxter, 204; *Munford* v. *Hanner*, 3 Baxter, 391, and *State* v. *Allen*, 1 Tenn. Ch., 512, as of the latter class. See also in accord with *Bramly* v. *Tyre*, and *Baird* v. *Turnpike Co.*, the case of *Hamilton* v. *Wynne*, 2 Vol. Legal Reporter, 287. So it is manifest that the question here is, whether the appointment of the receiver made by the Chancellor was within his competency or power. It is argued on behalf of the complainant, that the order virtually removed him from his office of executor, and this could only be done upon a bill filed for the purpose, making the direct charge of mismanagement and breach of trust and giving him the opportunity to an-

swer and defend. A suit or proceeding in the Chancery Court for the administration of an insolvent estate, is conducted upon equitable principles, as a creditor's bill against a trustee is conducted, according to the rules and principles governing a court of equity. Code, section 2363.

In a creditor's bill against a trustee, the court in the exercise of its inherent power, would have the undoubted right to make all such orders and grant such extraordinary process as might be necessary to preserve the trust property for the benefit of creditors, and such powers as to appointing receivers, etc., are also conferred by the Code, sections 3766, 3948.

There can be no question that upon a bill filed for the purpose, making the proper averments, the Chancellor would have the power at once to appoint a receiver and take the assets out of the hands of an administrator or other trustee, in advance of a hearing of the cause; such orders are made as injunctions and other extraordinary process are granted, and it is no objection to the existence of the power that it is exercised upon an *ex parte* hearing.

Upon filing the bill containing the proper averments, the complainant submitted himself and the assets of the estate to the jurisdiction of the court, and the court thereby acquired the power to make all such orders and decrees in respect to the assets or the action of the complainant himself, as might become necessary to preserve the assets and carry into effect the jurisdiction acquired. Upon discovering that the complainant was rapidly wasting the assets of the estate,

it was not necessary to file a new bill for the purpose of removing him, and suspend further proceedings as to the administration of the estate to await the determination of this collateral question as to the right of the complainant to continue to act as executor. Such a course would unnecessarily embarrass and delay the administration of estates.

Is is alleged in the petition for *supersedeas*, that complainant was absent from court at the time the order was made, and he can disprove or explain the charges made against him. If so, the entire matter being at all times within the control of the Chancellor, he can, upon being satisfied in regard to the facts, discharge the receiver and restore the assets to the hands of the complainant, if he deem it proper to do so. We are of opinion that the order in question was within the power of the Chancellor, and that we cannot revise his action or supersede its enforcement. If we were even to undertake to revise his discretion in this case, and could look to the affidavits on file as part of the record, we see that his order was fully authorized, as the affidavits show most wanton and reckless breaches of trust and appropriation of the assets by the complainant; and we should not be disposed to embarrass the action of the court below in administering summary relief against such conduct.

The *supersedeas* will be discharged, and the petition dismissed at petitioner's cost.

State *v.* Treadway and Thompson.

3L 55
16L 23

STATE *v.* LANDON TREADWAY and AB. THOMPSON, Jr.

WITNESSES. *Compensation. Must be paid by the County. When.* The compensation of witnesses examined by the Grand Jury in support of an indictment which they ignored, must be paid by the County, not the State.

FROM WASHINGTON.

Writ of error to the Circuit Court of Washington county. N. HACKER, J.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

An indictment against these defendants for larceny was prepared by the Attorney-General and sent with the witnesses summoned to sustain it, before the grand jury, who returned it "not a true bill." The Circuit Judge thereupon gave judgment against the State for the costs of these witnesses, and the State has brought the case up by writ of error.

The Code, section 5392, provides, "The compensation of a witness summoned before a grand jury, where no indictment is found upon his evidence, shall be paid by the county in which he is summoned." The case seems to fall directly within the provision of this section, and to require the county, not the State, to be taxed with the costs of the witnesses upon whose evidence no indictment is found. And so this court held at

the September term, 1877, in the case of the *State* v. *Dickson & Read*, in an opinion by Judge Turney, construing the section.

The argument on behalf of the county rests principally upon the Code, sections 5585, 5586. By these sections the State is chargeable with the costs of criminal prosecutions for offenses punishable by confinement in the penitentiary, when "the defendant is discharged by the court or magistrate before indictment preferred or found." But the provisions of the Code are not necessarily inconsistent. By the sections just cited, provision is made for the costs where the defendant is discharged by the court or magistrate, without reference to the action of the grand jury, upon his judicial responsibility and finding. By section 5392, the costs of witnesses summoned and sent before the grand jury, are made a charge upon the county where no indictment is found upon their evidence. The duty of this court is to give effect to both of these provisions, if possible. And although the reason of the distinction made between the two classes of costs is not very obvious, the distinction itself is clear enough.

It is also argued on behalf of the county, that section 5392 is taken from the act of 1856, ch. 63, sec 2, entitled "An act to suppress betting on elections," and was perhaps intended for a limited class of witnesses. Although the caption and first section of that act are confined to the subject of betting on elections, yet the second section is general in its terms, expressly providing for the compensation of all witnesses summoned before any grand jury, and how that

compensation should be taxed and paid, constituting the law on those points both before and since the Code. Such legislation was then not unusual, and its abuse led to the provision of the Constitution of 1870, that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." The Constitution of 1834 contained no such restrictions.

The judgment must be reversed, and a judgment entered here against the county for the compensation of the witnesses and the costs of this court.

FANNIE D. COWART *v.* THOMAS COWART *et al.*

FERRY BOAT. *Not a fixture of the realty, though connected to land by a chain. Lien for purchase money lost by destruction.* A ferry boat with chain and buoys, etc., is not a fixture of the realty, although the chain by which it is run is fastened to the boat and to an island in the river—and hence a registered lien for purchase money is lost as to such property, by their destruction, and does not extend to a new boat and appurtenances substituted in place of the one destroyed or worn out.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

E. M. DODSON, for complainant.

M. H. CLIFT for defendants.

McFARLAND, J., delivered the opinion of the court.

Fannie D. Cowart, by deed duly executed and registered, sold and conveyed to Thomas Cowart as follows: "All the right, privileges and franchises I have in and to the ferry boat, buoys, chain and machinery now in use at what is known as the Swing Ferry and franchise at Chattanooga, Hamilton county, Tennessee, but I retain a lien on said property till said one thousand dollars" (the consideration) "are paid; as a further consideration for said sale I am to have my ferriage at said ferry free of charge. I also sell and convey to said Cowart all the right I have to fasten the rope by which said swing boat is run to the island in Tennessee river, known as Chattanooga Island."

The date of the deed and its registration was the 12th of October, 1874. On the 24th November, 1877, Allen & Paine, who had obtained judgment against said Thomas Cowart before a justice of the peace, caused execution to be issued thereon, which was levied as follows: "On the interest of Thomas Cowart in and to the Swing Ferry Co., consisting of boat, buoys, chain, rope and all other fixtures thereto attached."

Whereupon, Fannie D. Cowart filed this bill to enjoin further proceeding under said execution and en-

force her lien by sale of the property for the unpaid purchase money due her.

The answer of Allen & Paine sets up, and the proof shows, that the boat, buoys, chain and fixtures, which were in use at the time of the sale from Fannie D. to Thomas Cowart, had worn out and from time to time had been replaced by others of a similar character, (except a part of the old chain), before the levy under Allen & Paine's execution, and they claim that their levy was upon the interest of Thomas Cowart in said boats, buoys, chains, etc., as chattels, and they were not the same chattels conveyed by Fannie D. Cowart and upon which her lien was retained. The new boat and fixtures were substituted in the place of the old ones from time to time and used in the same way. The boat was run by means of a chain supported by buoys, and fastened upon Chattanooga Island, above the ferry. The interest claimed by Fannie D. Cowart and sold to Thomas Cowart was a half interest, and worth, including the franchise, etc., about one thousand dollars, while her half of the boat, buoys, chains, etc., as chattels was worth about $150, according to the proof.

We think it may be safely assumed that Fannie D. Cowart undertook to convey by her deed, not simply an interest in the boats, buoys, chain, etc., as *chattels*, but also a right or easement in the banks and the island, to maintain and run a ferry, under a proper license from the County Court; and upon the property and rights thus conveyed, her lien was properly retained and valid. If the boat, buoys and chain,

etc., were in the nature of fixtures to realty, a part of the ferry franchise, then changing these fixtures by substituting new ones as the old ones were worn out, would not destroy their character, and they would still remain part of the easement or franchise sold and conveyed.

If, however, these articles were merely chattels, then the lien would be lost with their destruction, and would not extend to new ones substituted in their place. In this latter view the levy of the execution of Allen & Paine upon the new boat and appurtenances would constitute a superior lien, provided the levy of their execution was upon these articles *as chattels*. The levy, as we have seen, was "on the interest of Thomas Cowart in the Swing Ferry Co., consisting of boats, buoys, chain rope and all other fixtures thereto attached." We do not understand this levy to embrace any interest of Cowart in the banks of the river or island, or his right to maintain a ferry, but simply the articles as personal property, and the levy was sufficient to fix a lien upon these chattels as such, provided they were subject to the levy. So that the question to be decided is, whether the boat, buoys, etc., were attached to the easement in the banks or ferry franchise, or were they merely personal property? The general subject of fixtures is one upon which much has been written, but the direct question whether the boat and appurtenances of a ferry are fixtures of the ferry franchise does not seem to have been decided, so far as we can find. The general rule in cases where it is doubtful whether erections upon the realty become

part thereof, is to look to the purpose for which the erection is made; that is, whether or not it was the intention that the erections should constitute a permanent improvement of the realty. Jones on Mort., sec. 429; *McDaniel* v. *Wood*, 5 Heis., 95.

There is an exception as to fixtures for the purpose of trade or manufactures.

The weight of authority seems to be, that rolling stock of a railroad is personalty—although there is conflict—and a mortgage of the road will not hold after acquired rolling stock, unless apt words be used for that special purpose. See Lacy's Digest R. R. Decisions, title, Mortgage. See Jones on Mortgages, sec. 452. It seems that an ordinary ferry boat could not be regarded as a fixture, as for instance a steam ferry boat or an ordinary flat boat—such boats are often removed and used elsewhere and for other purposes. This only differs in the fact that the rope or chain by which it is run is fastened to the boat and to an island, but the degree of strength or force with which it is fastened is generally the less important part of the criterion. Jones on Mort., sec. 429. It is true that the boats and appurtenances were probably placed at the ferry with the intention that they should not be removed, but the same might be said in many instances in regard to property strictly personal. They were not placed there as a permanent improvement of the ferry property. We conclude that the boat, buoys, chain, etc., were not fixtures, and although the complainant retained a valid lien on the articles sold, as they have been destroyed, the new

ones substituted in their place are not subject to her lien.

The complainant's bill was properly filed for the enforcement of her lien against the ferry rights sold, but the rights of the defendants, Allen & Pierce, under the levy of their execution, are superior as to the half of Thomas Cowart in the boat, buoys, rope or chain, etc., as personal property; and, it appearing that since the filing of the bill and injunction, complainant has sold and disposed of these articles, the decree of the Chancellor will be modified so as to hold complainant and her sureties on the injunction and attachment bond liable to the defendants, Allen & Paine, for the value of Thomas Cowart's interest in the property so levied upon by them, which will be ascertained by a reference to the master.

In other respects the decree will be affirmed. Complainant will pay the costs of this court and of the court below as to defendants Allen & Paine.

LONSON BUSH, Adm'r, *v.* ABNER PHILLIPS' Widow and Heirs.

PRACTICE IN SUPREME COURT. *Appeal from judgment by motion. Without Bill of Exceptions limited to errors assigned below.* Where the sureties of a Special Commissioner appeal from a judgment against them and their principal, by motion, on the Commissioner's bond, without a bill of exceptions, the record showing that they appeared and made defense, they will be limited in their assignment of errors to the points of defense made in the court below.

FROM FENTRESS.

Appeal from a judgment by motion in Chancery Court at Jamestown. SAMUEL H. LEA, Sp. Ch.

H. R. GIBSON for complainant.

S. E. YOUNG for defendants.

COOPER, J., delivered the opinion of the court.

Under this bill, filed for the purpose of selling lands for the payment of debts, the complainant, Lonson Bush, was appointed special commissioner to make the sale, and gave bond, with J. W. Gaudin and Robert Hurst as his sureties, payable to the clerk and master of the court for the use of the parties, conditioned to faithfully perform the duties of special commissioner, and obey all decrees that might be rendered

by the court affecting him as such. On the 3d day of December, 1877, a judgment was rendered by the court, on motion, against the principal and sureties in this bond, for the sum of $697.25, found to be in the hands of Bush, as special commissioner, by decree of the court at the previous term, and ordered to be paid in, with interest. The sureties appeared and resisted the entry of the motion as to them; and, on the hearing of the motion, resisted the recovery on the ground that the notice was given by the wrong parties, that the parties signing the notice and making the motion were not the proper parties either to give the notice, or make the motion, and, further, defended by pleading the statute of limitations generally. The sureties have taken an appeal to this court, but without any bill of exceptions.

If the proceeding by motion against a special commissioner and his sureties is to be treated as an independent suit, precisely as if the bond had been sued on at law, it is obvious that the only question which could be raised in this court, where there is no bill of exceptions, would be the validity of the judgment on its face. Without undertaking to determine this point in the present case, the court is of opinion that the appellants must be limited, at any rate, upon such an appeal, to the points of defense shown to have been relied on in the court below, where the record shows that they appeared and made defense. These are the right of the parties to act who gave the notice, and made the motion, and the statute of limitations. The latter defense is rested upon the lapse of more than

six years since, it is insisted, the money was received by the special commissioner. No particular statute is pleaded, but if we concede that the appellants may claim the benefit of the limitation of six years, Code, section 2775, the time would only begin to run from the accrual of the cause of action. But the condition of the bond is to obey the orders of the court, and the only order recited in the judgment or relied on in argument, is the order of the March term, 1877.

The notice of motion was given, and the motion made by the Trustees of Jamestown Academy, shown by the judgment itself to be parties interested in the recovery. The motion may be made, and of course the notice may be given, by "the party aggrieved," which would be any party entitled to the benefit of the fund. The judgment is in the name of the clerk and master, for the benefit of the trustees of the Jamestown Academy by name, and other persons interested in the fund.

There is no error in the judgment and it will be affirmed.

CRUSE & ADNEY *v.* W. N. B. JONES.

CONTRACT. *Building Committee. Personal liability.* A member of the Building Committee of a Church will be personally liable for the value of articles furnished by the plaintiffs, sent to, received and used by him in the erection, if he agreed to pay the debt as one of the committee, without limiting the extent of his obligation.

FROM LOUDON.

Appeal in error from the Circuit Court of Loudon county. E. T. HALL, J.

CORNICK & CORNICK for Cruze & Adney.

D. R. NELSON for Jones.

COOPER, J., delivered the opinion of the court.

Suit upon an account, in which the verdict and judgment were in favor of the defendant, and the plaintiffs appealed in error.

There is evidence in the bill of exceptions tending to show that the articles were furnished by the plaintiffs on the credit of the defendant and charged to him. They were intended to be used, and were used in the erection of a Baptist Church, the defendant being the Chairman of the Building Committee. They were shipped to, received by him, and used, in part at least, under his instructions. The defendant, in his examination as a witness on his own behalf, says: "Witness did agree to pay the debt as one of the com-

mittee, but not as an individual." The court charged the jury that defendant would be liable if the proof showed that he had ordered and received the goods; or if they were ordered by any one authorized by him; or if he received the goods and ratified the acts of those who did order them; or if he received the goods as an individual and promised to pay for them, not otherwise. In substance, the charge is, that the defendant is not liable unless he, as an individual, ordered, received, ratified or promised. His Honor gave no instructions upon the effect of the defendant's agreement to pay the debt as a member of the Building Committee, and refused the following instruction which he was asked to give: "If the jury should believe from the evidence that the defendant and others constituted an incorporated Building Committee for a Church, and that, as such, they purchased the articles mentioned, and have not paid for them, each member of the committee would be personally responsible for the debt, and the fact that they constituted a committee would not affect their liability—the members of such committee would be jointly and severally and personally liable."

It was error in the learned Circuit Judge not to charge, when requested so to do by the plaintiffs, upon the liability of the defendant if the jury should find that he did agree to pay the debt sued on as one of the Building Committee. And if he meant to be considered as charging, by the instructions given, that such an agreement would not bind the defendant individually under any circumstances, he was also in error.

The law is well settled, that a person acting in a representative character, as agent, committee, trustee, or otherwise, if he do not intend to make himself personally liable, must take care, in making a contract, to define the nature and extent of his obligation. *Kain* v. *Humes*, 5 Sneed, 610; *Broyles* v. *McCoy*, 5 Sneed, 602; Bish. Cont., section 357. The plaintiffs were entitled to the instruction asked for.

Reverse the judgment and remand for a new trial.

W. CRUTCHFIED and H. H. KNOX *v.* E. P. DURANDO.

PLEA IN ABATEMENT. To an action of replevin for a chattel before a justice, the defense that the justice has no jurisdiction because the chattel was in the possession of one of the defendants as an officer, by virtue of the levy of an attachment from the Chancery Court sued out by the other defendant, is a plea in abatement which must be in writing, under the Code, section 2901.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. J. B. HOYLE, J.

VAN DYKE, COOKE & VAN DYKE for plaintiffs.

J. A. MOORE for defendants.

COOPER, J., delivered the opinion of the court.

Action of replevin for a clock, commenced before a justice of the peace, carried by appeal to the Circuit Court, and there tried by the Judge without a jury, who gave judgment in favor of the plaintiff below, and the defendants appealed in error.

The correctness of the judgment of the Circuit Court on the merits is not disputed. The claim for a reversal is rested upon the ground that the justice had no jurisdiction of the suit, because the clock was, at the commencement of the action, in the custody of the appellant Knox, as deputy sheriff, by virtue of the levy of an attachment from the Chancery Court, issued at the instance of the appellant Crutchfield, under a bill filed by him against one J. C. Stanton, being described in the bill and attachment, and levied upon as the property of Stanton. But it is obvious that this defense was a plea to the jurisdiction of the justice, and, under the Code, section 2901, could not be received unless filed in writing. *Grove* v. *Campbell*, 9 Yer., 7; *Neville* v. *Northcutt*, 7 Col., 294. No such plea was offered, and the evidence relied on is inadmissible and irrelevant.

Affirm the judgment.

W. R. Wells *v.* The State and W. T. Nanny & Dick Howard *v.* The State.

Criminal Law. *Section* 4888 *of Code obsolete. Lawful for a white man to play cards with a free negro.* Section 4888 of the Code, making it a misdemeanor for a white man to play cards with any slave or free negro, is obsolete. The evil intended to be remedied has passed away with the emancipation of slavery.

FROM RHEA.

Appeals in error from the Circuit Courts of Marion and Rhea counties. D. C. Trewhitt, J.

Hyde & Brown for Wells.

R. C. & N. Q. Allen for Nanny and Howard.

Attorney-General Lea for the State.

Freeman, J., delivered the opinion of the court.

The parties were indicted and convicted in the Circuit Court for playing cards with a free negro, under Section 4888 of the Code.

That section makes it a misdemeanor for a white person to play at cards with any slave or free negro, and imposes a fine of not less than twenty-five dollars, with imprisonment in the county jail not less than one nor more than six months.

Our first impression was, that this statute might stand in connection with the act of 1865, Code, section 2745*a*, and the changed condition of things result-

ing from emancipation. But on careful reflection, we conclude the contrary to be the case.

Section 4888 was evidently passed to meet the demand of the state of things of which slavery was a part. Its principle is a distinction between the races and a prohibition against the association of the white man with either the slave or the free negro of that period, which is involved in the indulgence in games of hazard or address. The negro now emancipated, is equal before the law to the white man. It would be an unfair assumption to hold that a statute intended for an entirely different set of relations, should be held to operate under the changed state of things now extant in our State.

The equal rights of persons of color is recognized in its broadest extent by the act of 1865, Code, section 2745*a*, and subsequent sections, and all acts or parts of acts inconsistent therewith expressly repealed. We think the spirit and purpose of this act is an implied repeal of section 4888, even if it is not to be held inoperative because of the changed position of the black race in our State, and because it was made to meet an evil now passed away.

For these and other reasons that might be given, we hold that the offense charged has ceased to be one in our State, and that judgment should have been arrested.

Let the judgment be reversed and arrested, and the parties discharged.

3L 72
10L 113

HOWARD MYNATT *v.* J. H. MAGILL.

PRACTICE AND PLEADINGS. *Supersedeas to quash levy. Exempt property. Lien in a note.* Upon the supersedeas of a justice's execution to quash a levy on exempt property, the defense was that the debtor had given the creditor a lien on the property by the note on which the judgment was rendered; whereupon the debtor filed an amended petition, alleging that the provision of the note giving a lien was inserted by the creditor without his knowledge. Held, that the whole litigation should be tried in one forum, and the creditor was given his election to withdraw all objection to the jurisdiction of the court of law over the matter of the amended petition, or to have the levy quashed without prejudice to his remedy in equity.

FROM BRADLEY.

Appeal in error from the Circuit Court of Bradley county. J. B. HOYLE, J.

J. N. AIKEN for Mynatt.

J. H. GAUT for Magill.

COOPER, J., delivered the opinion of the court.

Mynatt superseded a justice's execution against him in favor of Magill, and moved to quash the levy on a lot of corn, upon the ground that the corn was exempt from execution, which motion was refused and his petition dismissed; whereupon he appealed in error.

The note on which the justice's judgment was rendered, after the usual promise to pay, added: "I hereby bind my entire crop for 1877 for the full payment of

the same, with interest from date." The appellee moved to dismiss the petition, because the terms of the note constituted a pledge or mortgage of the crop, which either passed the title to him, or estopped the debtor to deny the plaintiff's right. Thereupon, the appellant, by leave of the court, filed an amended petition, alleging that the provision of the note relied on was inserted without his knowledge by the appellee. The latter moved to dismiss the amended petition, upon the ground that the instrument could only be rectified in equity. The motion to quash the levy, and the motions to dismiss the petitions, were heard at the same time, when it was admitted that the corn levied on was of the crop of 1877.

The owner of exempt property has a right to sell or charge it, if he see proper to do so. *Cronan* v. *Honor*, 10 Heis., 533. And the language of the note gave a lien on the corn for the payment of the debt. *Osborne* v. *Royer*, 1 Lea, 217. A note, which is the foundation of a justice's judgment, may be looked to, on a motion to dismiss a petition for a *supersedeas*, to negative a fact mentioned in the petition, on which the right to the writ is rested. *McCorkle* v. *Brooks*, 6 Heis., 601. If now we look to the note in this case, we find it gives a lien which can only be enforced in equity. On the other hand, the defense of the amended petition to this lien is clearly cognizable only in equity. Whatever, therefore, might be the proper conclusion upon the effect of the lien if it were undisputed, it is obviously a case of equity against equity, which ought to be wholly tried in one forum.

The entire litigation ought either to be disposed of in this proceeding, or the parties left to their rights and remedies in equity.

The judgment must be reversed. But if the appellee will agree of record to withdraw all objections to the jurisdiction of the Circuit Court over the matter of the amended petition, so as to allow the case to be proceeded with under the Code, section 4236, we will hold that the lien given by the note is, if found to be the act of the appellant, a waiver of the right of exemption, and remand the cause to be proceeded with. Otherwise, judgment will be rendered here sustaining the right of the plaintiff in error to the exemption claimed, but without prejudice to the right of the defendant in error to enforce his lien in equity. In the former event the appellee will pay the costs of this court; in the latter the entire costs.

SPIRO *v.* PAXTON.

EXEMPTION. *Partnership property.* Partnership property is not exempt in the hands of one member of the firm who is the head of a family.

FROM KNOX.

Appeal in error from the Circuit Court of Knox county. S. A. ROGERS, J.

L. A. GRATZ for Spiro.

GEORGE WASHINGTON for Paxton.

FREEMAN, J., delivered the opinion of the court.

The facts are that a partnership existed between Herman Spiro and his brother, the former being married, the head of a family, the other not. Judgment was had on firm liability, and levied on a wagon owned by the firm and used in their business as bakers for delivery of bread to customers.

The question made in the case is, whether our statutes exempting certain property in the hands of the head of a family, including a wagon, applies in favor of the firm, one member being entitled to such exemption as head of a family as to his individual property. We hold with what is conceded to be the weight of authority, that the exemption does not apply. This is not individual property in his hands, but the property of the firm. The individual has no separate interest in it until the firm is settled up, its debts paid,

and in this case, as it is insolvent, has none or will have none. The policy of the statute is to exempt such property as is used by the party for the benefit of his family and their convenience, but does not include property owned by a firm and used in their business for profit. We do not deem it necessary to go into a discussion of the reasons for and against this conclusion, or the opinion of courts of our sister States that have maintained the one view or the other. A full citation of cases and discussion will be found in Thompson on Homestead and exemptions, sec. 127, *et seq.*

The charge of his honor holding the property not exempt was correct, and the judgment is affirmed.

WESLEY AVANS *v.* JOHN EVERETT *et als.*

HOMESTEAD. *Tenants in common.* The homestead right does not exist where the occupant has only an individual interest as tenant in common with others.

FROM M'MINN.

Appeal from the Chancery Court at Athens. A. S. MARKS, Ch., presiding by interchange with W. M. BRADFORD, Ch.

A. BLIZZARD and J. N. AIKEN for complainant.

W. N. BRIANT for defendant.

COOPER, J., delivered the opinion of the court.

On the 18th of January, 1873, W. H. Brock was living with his family on land in which he owned a one undivided ninth interest in fee as tenant in common with others. His share of the land was worth less than $1,000, and was claimed by him as a homestead. On that day his interest in the land was levied upon by his judgment creditors and regularly sold at execution sale and bought by the creditors. On the 20th of January, 1873, two days after the levy, Brock sold the land to Elmore Brock, and conveyed it to him by deed, in which his wife joined. Shortly afterward W. H. Brock removed with his family from the land, and has since set up no claim to it. The entire tract of land has been sold for partition, and the agreed state of facts has been made up with a view to determine whether the judgment creditors who purchased under their executions or Elmore Brock should receive the proceeds of the one-ninth share as having the better title to the land.

The statute regulating the homestead right, when the respective titles of these litigants accrued, exempted from sale under legal process a homestead in the possession of each head of a family, and the improvements thereon, to the value of $1,000. The statute further provides that whenever the real estate of such head of a family was levied on by legal process, the officer executing the writ should summon three free-

holders to set apart the homestead, "and set out in writing the boundaries thereof, and deliver the same to the debtor." T. & S. Rev., sec. 2116a.

The statute expressly authorizes the sale of the remainder of the land under the legal process, or the whole land, if it be so situated that it cannot be divided, in which latter case the creditor was entitled to have one thousand dollars of the proceeds invested in other land as a homestead. The statute manifestly contemplates the occupancy of a specific portion of land, capable of being set apart by metes and bounds. It is impossible to apply its provisions to an undivided interest in realty. The debtor owns nothing in severalty, and the creditor could neither ascertain nor of course subject the remainder after setting apart the homestead. Until the Legislature changes the provisions of the law, or makes specific provisions for the case, we see no mode of conceding the homestead right consistently with the equally declared rights of creditors. The weight of authority under similar statutes is in accord with this conclusion. Thompson on Homesteads, sec. 180, *et seq.*

It is probable also, under the decisions of this court, that the execution sale passed the debtor's interest in the property, subject only to the homestead right, which ceased with the occupancy of the head of the family. *Crook* v. *Lunsford*, 2 Lea, 237.

The Chancellor's decree must be reversed, and a decree rendered here in favor of the purchasers at the execution sale. The costs will be paid out of the fund.

3L 79
3L 341
8L 598
15L 239
4pl 141

3L 79
110 608
110 610

3L 79
116 480

STATE OF TENNESSEE *ex rel.* JOHN R. MORRELL *et als.* *v.* R. P. FICKLE, Ch'n, etc.

1. ACT CONSTRUED. Act of 1879, Ch. 127, "to establish a Chancery and Law Court at Bristol, in the county of Sullivan," is constitutional.

2. CONSTITUTIONAL LAW. *Acts of Legislature. Subject and title.* Art. 2, sec. 17, of the Constitution, prohibiting laws from being passed which embrace more than one subject, that subject to be expressed in the title, and providing that all acts which repeal or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended, is to be liberally construed, otherwise useful legislation would be unnecessarily embarrassed.

3. SAME. *Repeal of former laws.* If the Legislature pass an act repealing a law without reciting in its caption or otherwise, the title or substance of the law reperled, and a subsequent act is passed at the same session and within a few days of the same time of the first act, repealing the law which was attempted to be repealed by the first act, the two acts may fairly be supposed to have been in the minds of the legislators at the same time, and will be regarded as parts of the same legislation, and upon the passage of the last act, removing the constitutional objection to the former, it becomes valid in all respects.

FROM SULLIVAN.

Appeal in error from the Circuit Court of Sullivan county. N. HACKER, J.

U. S. YORK and H. H. INGERSOLL for petitioners.

C. J. ST. JOHN, W. D. HAYNES and W. V. DEADERICK for defendant.

MCFARLAND, J., delivered the opinion of the court.

This is a petition for mandamus to compel the Chairman of the County Court of Sullivan county to

issue his warrants to the jurors and officers of court serving as such at a term of a law court recently before held at Bristol in said county. An alternative writ was granted, but dismissed upon the ground that the act of the Legislature establishing the court is unconstitutional and void, and this is the question upon which the cause has been submittled to us, the opposing counsel supporting their respective views with able and exhaustive arguments.

The act in question is ch. 127 of the acts of 1879, passed the 18th March and approved by the Governor the 20th of the same month. The objections to it are that it violates sec. 17 Art. 2 of the Constitution, or that part thereof in the following words: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended."

The specific objections are that the act contains more than one subject, that the subject is not expressed in the title, and that it repeals former laws and does not recite in the caption or otherwise the title or substance of the law repealed.

It is entitled "An act to establish a Chancery and Law Court at Bristol, in the county of Sullivan." The first nine sections relate to a chancery court to be organized and held at Bristol by the Chancellor of the first division at times specified, and defines the extent of its jurisdiction and other matters incident to the court thus established. The remaining sections

provide for the establishment of a law court at Bristol as one of the courts of the first circuit, to be held by the judge thereof at times specified, and other matters incident to said court.

The argument is that this act embraces two subjects, one the establishment of a chancery court, the other the establishment of a law court.

The solution of this question depends in a great measure upon whether we adopt a liberal or a strict construction of the clause in question. A construction might be adopted of such a latitudinous character as virtually to neutralize the beneficial effects intended to be secured. On the other hand, a too rigid and strict construction would, in many instances, unnecessarily embarrass useful legislation.

The duty of the court to pass upon the constitutionality of legislative acts is a very grave and responsible one. Every presumption should be made in favor of the validity of the laws. The members of the Legislature in enacting laws must of necessity judge of their constitutionality in the first instance, and the opinion of that body, which is not conclusive upon the court, is yet entitled to the respectful consideration due from one department of the government to another, and while the Constitution is the supreme law, and the courts should not, out of any mere feeling of deference to the Legislature, hesitate to maintain its supremacy, yet legislative acts should not be subjected to a hypercritical test. If subject to two reasonable constructions, they should be construed so as to give them effect rather than to defeat them.

They should not be declared void unless they appear to be manifestly so according to the plain letter and spirit of the Constitution. Such are in substance the general principles maintained by Judge Cooley in his standard work, Cooley C. L., p. 182, and also by this court in *Cannon* v. *Mathes*,, 8 Heis.

Coming more directly to the provisions in question, Judge Cooley says, and his language is quoted with approbation in the case above referred to, that "there has been a general disposition to construe these provisions liberally rather than embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it is adopted."

Again, "the general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated in its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act, would not only be unreasonable, but would actually render legislation impossible." Const. L., p. 144; 8 Heis., 519.

In the case of *Cannon* v. *Matthes*, above referred to, the title of the act passed upon is "an act to fix the State tax upon property," and the first and second sections does fix the tax upon property, but the fourth section increases the tax upon privileges fifty per cent., it was held that the act was valid, that it had but one general object, that was to raise revenue.

A correct view of this question may be obtained

by bearing in mind the evils intended to be guarded against. "The interest of these provisions was to prevent the union in the same act of incongruous matters, and of objects having no connection or relation; and with this, to prevent surprise in legislation by having matter of one nature embraced in a bill where the title expressed another." To prevent log-rolling or omnibus bills, and the frauds and corruptions sometimes supposed to prevail in such cases; to prevent smuggling through important measures, as amendments to, or as parts of other laws with which they have no connection, such for instance as attaching a charter for a bank, to a bill granting aid to a railroad, or a section creating a felony, to an act relating to a public road.

Does this act come fairly within the evil to be remedied? Shall we say that the establishment of a chancery court at Bristol is one general subject, and the establishment of a law court is another general subject, and that it is necessary, in order to maintain the integrity of the clause of the Constitution in question, to hold that these two general objects should be accomplished by separate acts. Is the establishment of these two courts at the same place two general subjects, incongruous and without connection or relation with each other? Are the provisions of the act such as to operate as a surprise upon legislators or others, or to open the way to frauds and improper influences, such as are supposed to obtain in "omnibus" or "job" bills? We think not. It can hardly be doubted that a bill to establish a new county might properly

provide for all necessary courts. These would be mere incidents germain to the general subject. The general subject of this bill is not so broad, and we think a proper construction of this act will be to hold that the general subject is the establishment of such additional courts for Sullivan county as, in the opinion of the Legislature, the public exigencies demanded, and with the general object, the act contains nothing incongruous. A contrary holding would, in our opinion, be to establish a rule so rigid as to embarrass legislation, when such construction is not necessary in order to accomplish the ends designed.

These views also settle that the subject is sufficiently expressed in the title. Treating the general subject of the act as the establishment of such additional courts for Sullivan county as the public exigencies demanded, it is manifest that this general subject is expressed in the title, to-wit., "An act to establish a Chancery and Law Court at Bristol, in Sullivan county." This undoubtedly gives notice of what the act may be expected to contain, and it cannot fairly be said that the title is deceptive or misleading. It is argued that the title indicates but one court, a court having common law and equity jurisdiction, whereas the act provides for two courts, one of chancery and the other of law jurisdiction. This may be the strictly grammatical construction of the language of the title, but the point, though ingeniously pressed, is too fine for practical application.

"The generality of the title is no objection to it so long as it is not made a cover to legislation in-

congruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection." 8 Heis., 519.

We have certainly no disposition to "fritter away" the important and salutory provision of the Constitution in question, but we are not at liberty to subject legislative acts to too rigid and technical criticisms in order to avoid their force, even though the legislative right be thought undesirable. The same session of the Legislature passed a series of acts in relation to the repeal of certain municipal charters, and for the establishment of taxing districts (see chapters 10 and 11), under which the city of Memphis was re-organized as a new municipal government. The validity of the acts was strongly contested, and at the recent term at Jackson the majority of this court held the act valid, after full arguments. The opinions are not now before us, but it will be readily seen upon reference to said acts, that the objections to them are much more serious than to the present act, and the principles decided fully support our present conclusion.

The only remaining question is, that the act repeals former laws without reciting the title or substance of the acts repealed. This has reference to the section of the act fixing the time for holding the law court at Bristol, which are the same days provided by a previous law for holding the circuit court at Blountville, and the title or substance of the previous law is not recited in the title of the present act or otherwise. But at the same session and in a very few days afterward another act (ch. 140) was passed which

is free from objection, changing the times of the court at Blountville, and avoiding the conflict. If it be conceded that the section of the act under consideration as to the time of holding said court is obnoxious to the Constitution for the reason indicated, it would not, in our opinion, be a sound reason for declaring the entire act void. The two acts were passed at the same session, and passed within a few days of the same time, and may fairly be supposed to be in the minds of the legislators at the same time, parts of the same legislation, and when the last act became a law removing the conflict, there is no good reason why the former should not be valid in all respects. This relieves from any further consideration of the question whether the clause of the Constitution has reference to acts merely inconsistent with former laws, and operating as an implied repeal thereof, or only to acts which simply purport, without more, to repeal former acts.

The judgment will be reversed, and the cause remanded, with directions that a peremptory mandamus issue.

FREEMAN, J., delivered a dissenting opinion.

This case involves the constitutionality and consequent validity of an act of the Legislature entitled "An Act to establish a Chancery and Law Court at Bristol, in the county of Sullivan."

The first nine sections are devoted to the establishment of a chancery court, if the word establish-

ment is appropriate to what is done, to be held at the town of Bristol, and for that purpose in the first section the 17th civil district of the county of Sullivan is made a chancery district, and a court to be held at Bristol for said district by the Chancellor of the first division of the State, two terms per annum, at times appointed. Provisions are then made for a chancery clerk and master, officers to attend said court, that citizens of certain other districts may bring their suits in this court. And then in the 9th section a provision is made that the citizens of the town of Bristol shall bear the expense of building a court house.

We note in these provisions a complete and perfect enactment, covering all that is included in the idea of and incidental to the subject of a chancery court to be held in the town of Bristol. I think the correct principle of construction of the clause of our Constitution requiring that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title," is, that the title shall express the subject or object of the bill with such distinctness as that on reading the title or hearing it read, we can fairly know what the purpose of the bill is, and that this subject or purpose shall be but one, not two or more objects. When this one subject is thus expressed, then all such things as are incidental to and appropriate to effect the main object expressed may be fairly held to be included. To illustrate, the title of a bill may be to establish a law or circuit court at the town of Bristol in Sullivan

county. Under this title would be included the requisites of a court—a clerk, officers to attend it, time and place when and where held, with the jurisdiction of said court. All this would be fairly included under the title of the bill. But I am unable to see how a chancery court could be included under such a title, unless we should assume that a law court includes a chancery court, or *e converso* a chancery court might be incidental to a law court. If this be so it is because they are separate and distinct subjects or objects, having no necessary or natural connection the one with the other. Conceding this, however, and it follows inevitably to my mind that the title "to establish a chancery and law court at Bristol" must express two subjects, and therefore violate this clause of our Constitution. The title is held by the majority to express the subject of the bill, and to mean a chancery and a circuit court. Concede this, and I am unable to see how the conclusion is avoided that there are not two subjects expressed in the title, unless we hold that chancery and law courts are the same things, or are not different subjects or objects. We know that one may exist without the other under our system, and that each is a distinct entity, having well defined characteristics of diversity. In fact, we have in this bill a most striking illustration of the essential independence of the two subjects. The first nine sections are exclusively devoted to the establishment of a chancery court; the next ten, we believe, to the law court. All the provisions of the first nine sections apply to the subject of a chancery court.

The necessary incidental legislation for the establishment of such a court is complete, and then another and distinct subject, a law court, is taken up, and another and different set of arrangements made for its existence. That these subjects are different, and impossible to be made one, is shown by the fact that it would be utterly incongruous, if the provisions for the one should be applied to the other. The matter for the chancery court could not be placed in or be a part of the provisions for the law court without totally subverting the object designed. How, then, can matter diverse relating to a subject requiring entirely different arrangements for its operation be held to be identical with and the same as that other thing from which it so essentially differs? In other words, the subject of the establishment of a chancery court at Bristol, differs from the subject of the establishment of a law or circuit court at that place by the whole width of the well recognized and long established differences between the two courts, administering different remedies for different rights, defined by our jurisprudence, and by different forms of procedure. This difference is recognized both in our Constitution and in all our legislation in reference to the two kinds of courts. In view of this, I am unable to see how the establishment of these different things, essentially different in their nature, is but one subject. I think the title should be held to express two subjects, and most assuredly if it does not the body of the act does, and this is equally fatal.

For these and other reasons that might be given, I am compelled to dissent from the opinion of the majority of my brethren.

R. H. Ferguson *et als.* v. Vance & Kirby *et als.*

1. Lien on Boats. *Suit to enforce is a suit at law.* A suit to enforce a lien on a steamboat, under the Code, sec. 3550 *et seq.*, is a suit at law, and in the absence of a bill of exceptions, the findings of the court on the facts is conclusive.

2. Same. *Replevy bond. Amount to be recovered.* Where in such a suit by one claimant the steamboat is attached, and at once replevied by a bond payable to that claimant, in the penalty of double the amount of his claim, conditioned to abide by and perform the judgment of the court if rendered in favor of that claimant to enforce his debt upon the boat, the obligors are only bound, to the extent of the penalty, for the judgment in favor of that claimant for debt and costs, and the boat is released.

3. Same. *Code sec.* 3558 *construed. Practice.* The prohibition of the Code sec. 3558, that after a warrant and seizure of the boat at the suit of one creditor, no other creditor shall have a warrant to attach the boat, applies only while the steamboat is in the custody of the law under the first attachment; and if the boat be released by replevy, any creditor may, either in that or another suit, sue out a warrant of seizure.

4. Same. *Amount of bond. To whose benefit it enures.* The boat cannot be replevied except by giving a bond in the penalty of double the amount of the claimants then in the suit, and such a bond would enure to the benefit of such claimants equally.

5. Same. *Practice and pleading.* The remedy for non-compliance with any of the requisites to the making of a claimant a party is by motion to take the papers off the file, not by demurrer to the declaration.

Ferguson *v.* Vance & Kirby.

3. SAME. *Wages. Recovery of judgment no waiver of lien.* A claim for wages as an engineer or hand, being for work and labor done, is good on demurrer, and a recovery of judgment on a claim is no waiver of of the statute lien.

4. SAME. *Practice and pleadings.* If the account made an exhibit to the petition of a claimant against a boat give the dates of the items, showing that they were within the three months, a motion to dismiss the petition because it fails to state the fact will not lie. Nor is a petition multifarious because, while proceeding against the owners of the boat upon a debt contracted by them, it mentions an account against a previous owner.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. J. B. HOYLE, J.

LEWIS SHEPHERD for Ferguson.

WHEELER & MARSHALL for Kirby & Vance.

COOPER, J., delivered the opinion of the court.

By the Code, sec. 1991, bringing forward the act of 1833, ch. 35, it is provided, "Any debt contracted by the master, owner, agent or consignee of any steam boat within this State, on account of any work done, or materials or articles furnished for or toward the building, repairing, fitting, furnishing or equipping such boat, or for wages due to the hands of the same, shall be a lien upon such boat, her tackle and furniture, to continue for three months from the time said work is finished, or said materials or articles furnished, or said wages fall due, and until the termination of any suit that may be brought for said debt." The mode of enforcing the lien by petition and attachment is prescribed by the Code, secs. 3550–3562 inclusive.

The original act was construed by this court in *Hill* v. *Mills*, 9 Hum., 629, and *Greenlaw* v. *Potter*, 5 Sneed, 390, and as embodied in the Code, in *Emory Iron and Coal Co* v. *Wood*, 6 Heis., 198, and *Waggoner* v. *St. John*, 10 Heis., 503.

On the 1st of July, 1876, the defendants in error, Vance and Kirby, under the provisions of the Code, commenced the proceedings in this cause, claiming to be creditors for materials furnished to repair, run and equip the steamboat Ida, the items composing the debt being set out in an account made an exhibit to their petition, and the plaintiffs in error, B. H. Ferguson, Joseph Smith and T. M. Rowden being described as the masters, owners and agents of said steamboat during the time of the contracting of the debt. The amount of the account was declared to be justly due, together with a further sum mentioned, evidenced by another exhibit, contracted by the owner, master and agent of the steamboat while owned, run and controlled by Capt. C. C. Spiller. A warrant was thereupon issued returnable to the next circuit court, directing the sheriff to attach the steamer Ida, her furniture and tackle, "alleged to be the property of B. H. Ferguson, Joseph Smith and T. M. Rowden," and to summon said owners to appear at said court. Following the language of the Code, sec. 3554, the sheriff was directed to attach the boat, furniture and tackle, or so much thereof as may be necessary, and safely keep the same until security is given, or further order of the court. By sec. 3555 the sheriff is required, after seizing the property, to retain possession of it

until the termination of the suit, unless bond and security be given in a penalty of double the amount of the debt claimed, payable to the plaintiff, conditioned to abide by and perform the judgment of the court, if rendered in favor of the plaintiff. The sheriff levied on the steamboat as directed on the same day, and summoned Ferguson and Smith, two of the alleged owners, to appear at the next term of the circuit court, commencing on the first Monday of September. During that term Vance and Kirby filed their declaration against the owners of the steamboat, and a number of other claimants of a similar lien were allowed, on motion, to become parties plaintiff, and filed declarations. Ferguson, Smith and Rowden appeared and moved to dismiss the original and other petitions, which motion was overruled. They then filed demurrers to the declarations of the various claimants, which were also overruled. They then pleaded to the declarations, and the suits were tried on the 9th of March, 1878, by the judge, without a jury, who rendered judgments in favor of Vance & Kirby, and of several other of the claimants, for the amount of the items of their respective accounts within three months prior to the 1st of July, 1876. The court found as a fact that on the very day on which the attachment was levied the defendants Ferguson, Smith and Rowden had replevied the steamer by entering into bond, with C. W. Coker as surety, in the penal sum of $306.22, double the amount of the claim of Vance & Kirby, which bond was made payable to Vance & Kirby, and was conditioned that they, the

said Ferguson, Smith and Rowden should abide by and perform the judgment of the court, if rendered in favor of the said Vance & Kirby against said Ferguson, Smith and Rowden as owners, to enforce the collection of a debt of $153 as a lien against the steamer Ida, under secs. 3550–3562 of the Code inclusive. And he gave judgment against the obligors for the full penalty of the bond, and directed the proceeds, after the payment of costs, to be paid pro rata among all the parties whose claims had been adjudged. The court further found that the steamer Ida was not in the custody of the court. From this judgment Ferguson, Smith and Rowden prayed and obtained an appeal to this court. And it is agreed that the case be heard as upon a writ of error by Vance & Kirby, and C. W. Coker, the surety on the replevy bond.

It has been held by this court that the proceeding under the statute is *in personam*, not *in rem*, against the owners of the steamboat, who are brought in by service of process on them or their property. *Waggoner* v. *St. John*, 10 Heis., 503, 518. In this view the action is strictly one at law, and has been so treated in the form of procedure pursued. No bill of exceptions has been filed, and consequently the judgment of the court is conclusive in its findings of fact. Conceding the facts to be as set out in the judgment, it is clear that his Honor erred in charging the obligors in the replevy bond with the full penalty of the bond. That penalty was in double the amount of the claim of Vance & Kirby, the only claim then brought against the principal obligors or the steamboat,

and was conditioned to abide by and perform the judgment of the court if rendered in favor of Vance & Kirby to enforce a specific debt as a lien upon the steamboat. Upon no principle can the obligors of a bond be held bound beyond its terms, unless, indeed, the law positively fixes the liability without respect to the language used. *Deaton* v. *Mulvaney*, 1 Lea, 73. There is no such provision of law in this case, the bond being authorized by the Code, sec. 3555, and following the language therein prescribed. Nor is there any ground for holding the subsequent claimants entitled to its benefit. They were not then in court, and it was neither intended to apply, nor does it in terms apply, to any other claimants than Vance & Kirby.

His Honor seems to have been influenced in coming to his conclusion on this branch of the case by the argument, which has been also made in this court, that under the Code, sec. 3558, after a warrant and seizure of the boat at the suit of one creditor, no other creditor shall have or obtain a warrant to attach or seize the boat, but must make himself a party by motion before trial as prescribed by sec. 3557. And inasmuch as the provisions of the Code manifestly contemplate equality of rights among the successful claimants, it seems to follow that the claimants must share equally in any recovery. But the prohibition of the Code, sec. 3558, was intended to prevent an unnecessary accumulation of costs, and the clashing which might ensue from the suing out of several warrants in the hands of different officers, and

returnable, it might be, to different tribunals. It applies only when and while the steamboat is in the custody of the law under the original attachment. If the boat is released by replevy under sec. 3555, there can be no doubt that another creditor might at once sue out another warrant of attachment, either in the original suit or independently. For the defendants having obtained a release of their property in the mode prescribed by law, the object of the law in requiring the parties to come into the same suit in order to save costs, is done away with by the act of the owners of the boat, and the new suit, if a new suit be brought, becomes the nucleus for other claimants. It is true the claimant might sue out a warrant to constitute a part of the first suit, if he elects so to do, the advantage of such a course being that the claimant may have the benefit of the stoppage of the running of the limitation of three months worked by the commencement of the first suit. *Emory Iron and Coal Co.* v. *Wood,* 6 Heis., 201. But assuredly the owners who have replevied their boat, and thereby deprived other claimants of the security of the original seizure, cannot complain if the creditor sue out an independent attachment. The property is no longer in *custodia legis,* but again open to seizure. And although a second seizure pending the first might be void if made with full knowledge, it probably would not be if made in ignorance of the prior seizure, and would certainly be good if the defendants replevy by a bond limited to the debt of the first attaching creditor. The equality among the creditors, provided by

sec. 3562, is expressly in the proceeds of the sale of the boat, but the other provisions fairly imply that the penalty of the replevy bond shall cover the entire debt claimed at the time, and, of course, all the then claimants would be equally entitled to its benefits.

The proceeding being *in personam*, the owners of the boat who are personally liable for the debt are the proper defendants, and the judgment was correctly rendered against them. Whether the circuit judge was also right in holding that, having brought such owners before the court, the creditors were entitled to enforce their statutory lien, although such owners held under a contract of purchase by which the legal title was retained in their vendor, becomes immaterial. The original seizure and replevy gave the claimants a right to come in and assert their claims, and the boat being no longer under the control of the court, the question of the power to sell it is of no importance.

It is argued on behalf of the plaintiffs in error, in support of their motion to dismiss the petition of Vance & Kirby, that the petition fails to state that the articles of account were furnished within three months. But the account is made an exhibit, and shows the date of each item, and that some of them are within the time. This is sufficient. *Emory Iron and Coal Co.* v. *Wood*, 6 Heis., 199. Nor is the objection of multifariousness to this petition well taken. The account against the previous owner of the boat is mentioned, but the proceeding is against Ferguson, Smith and Rowden, and they alone are ordered by the warrant to be summoned.

It is also argued in support of the demurrers to the several declarations, that the declaration contains no averment that the claimant had put himself into a position to have the benefit of Vance & Kirby's petition. But the statute authorizes the claimant to make himself a party plaintiff by motion. Code, sec. 3557. It is not required that the fact should be stated in the declaration. The remedy for non-compliance with any of the requisites necessary to make a creditor a party, was by motion to take the papers from the file, not by demurrer to the declaration.

One of the claimants states his claim to be for wages as an engineer, or hand on the steamboat, being for work and labor done. *Prima facie*, the averment is for wages due him as a hand or laborer, and good upon demurrer. Whether he might not, by plea, have been shown to be of a class of engineers not falling within the meaning of the statute, it were useless to consider. And clearly the recovery of a judgment on a claim is no waiver of any lien given by contract or law for its security. No point is made in the pleadings, or, so far as appears, on the trial, to the jurisdiction of the court on account of the amount of Vance & Kirby's claim within the three months.

The judgment on the replevy bond will be reversed, and a judgment rendered here against the parties thereto in favor of Vance & Kirby for the costs of the court below, and Vance & Kirby's debt as ascertained by the judgment. The direction for a pro

rata division of the recovery on the bond will be reversed and annulled. In other respects the judgment will be affirmed with costs.

THE STATE OF TENEESSEE *v.* DAVID GODDARD, MOSES ELLIOTT and W. C. CONNER.

1. COUNTY COURT. *Personal liability of members for nonfeasance.* The members of a county court are not liable to the State for loss of public revenue resulting from their failure to take bond from the revenue collector, before allowing him to collect revenue.

2. REVENUE OFFICER. *Bond.* Any revenue officer failing to file his bond in the time prescribed by law, vacates his office by such failure, and if he perform any official act without having first given bond, he is liable to criminal prosecution.

FROM BLOUNT.

Appeal in error from the Circuit Court of Blount county. E. T. HALL, J.

ATTORNEY-GENERAL LEA and R. N. HOOD for the State.

A. CALDWELL & SON for Goddard *et als.*

DEADERICK, C. J., delivered the opinion of the court.

This is an action of trespass on the case against defendant Goddard as the Chairman of the County

Court, and the other defendants as associate justices of the County Court of Blount county.

One J. C. Edmondson was revenue collector for 1869, and as such, collected a large amount of taxes due the State, and was insolvent, and failed to execute bond and give security for the faithful performance of his duty as revenue collector for that year.

Defendants were present in court, acting as justices thereof, at the term at which the collector should have given bond, and it is for this failure to execute bond with security, or the failure and omission of the justices to take bond, etc., that this suit is instituted.

It is made the duty of the person elected revenue collector to enter into bond with security, which bond the clerk of the County Court is required to produce to the Judge of the Circuit Court, at his first term after it is taken, for his examination and approval, and if approved it is to be forwarded to the Comptroller. Code, section 728–9.

If, after the election, for a period of four months, no bond is received by the Comptroller, it is made his duty to give notice of the fact. Section 722.

The statute does not impose upon the Justices or County Court the duty of compelling the revenue collector to execute bond. But it provides, if for any cause such bond was not taken at the proper time, that it may be taken at the next or any subsequent term. Nor is there any statute that makes the Justices or County Court personally liable for failure to take a proper bond, at the proper time. But the officer failing to file his bond in the time prescribed

by law, vacates his office by such failure, and if he perform any official act without having first given bond, he subjects himself to a criminal prosecution.

Judgment and verdict were for the defendants, and we think there is no error in the record, and the same will be affirmed.

MOBILE LIFE INSURANCE CO. *v.* JAMES B. MORRIS.

1. EVIDENCE. *Insurance.* The declarations of a person insured for the benefit of another, made before or after the insurance and not a part of the *res gestæ*, are not competent evidence upon a suit to recover the amount of the policy.

2. SAME. *Burden of proof.* When the question is, whether the answers of the insured were false or fraudulent, the burden of proof is on the insurer.

FROM BRADLEY.

Appeal in error from the Circuit Court of Bradley county. J. B. HOYLE, J.

J. H GAUT for Insurance Co.

P. B. MAYFIELD for Morris.

DEADERICK, C. J., delivered the opinion of the court.

This action was brought by defendant in error to recover $1,000, the amount of insurance upon the life of Blount Morris, taken by him upon his own life for the benefit of said James B. Morris, his son.

Verdict and judgment were for the plaintiff below, and the court refusing a new trial, the Insurance Company has appealed to this court.

Morris' counsel has presented a certificate of the clerk of the court in which the judgment was rendered, to the effect that the bill of exceptions in the case was held up by the judge who presided at the trial, until after the adjournment of the term at which the trial was had, and was not returned to the clerk's office nor filed, until several weeks after the adjournment of said term, when it was returned, signed by him.

The certificate was made several months after the adjournment of the term at which the trial took place, and is no part of the transcript of the record of said cause, and cannot be looked to, or considered for the purpose of contradicting said record. It shows that a bill of exceptions, which is set out, was signed and sealed and made part of the record in this cause.

In considering and determining the questions raised, we therefore treat what purports to be a bill of exceptions, as part of the record in the cause. And the questions discussed, mainly, arise upon rulings of the court in rejecting evidence offered by the defendant below.

Upon the application, Blount Morris had answered,

as insisted by defendants below, falsely, questions propounded to him, as to his age and health. He stated that he was sixty years old, and that he had never had any one of several diseases named, whereas, it is insisted that he was sixty-nine years of age at the time, and had been subject to several of the diseases about which he was interrogated. These facts, if true, would materially increase the risk, and by the terms of the contract, avoid the policy.

In order to establish these facts, the defendant, on the trial below, offered to prove by several witnesses, introduced by him for that purpose, that Blount Morris, both before and after he had taken out the policy, had at various times admitted facts showing that at the time of taking said policy he was about sixty-nine years of age, and also that he had had one or more of the diseases which he had denied, on his examination, that he ever had.

The court, upon objection made, excluded said evidence, and defendant excepted. And this ruling by the court it is insisted by the plaintiff in error, is erroneous.

It is certainly true, that the facts in respect to the age and health of the insured, which it was sought to establish, were legitimate, if proved by the direct testimony of witnesses who had knowledge of them. But the point of the objection is, that they are not provable by evidence of the declarations or admissions of a party whose life is insured for the benefit of another.

Upon this question there is a conflict of opinion;

the earlier cases holding that the evidence is admissible for the purpose of proving fraud in obtaining the policy. See Bliss on Life Ins., 620; citing 35 Conn., 225; 6 East, 188; Ellis on Ins., 123. In these cases the declarations were made very shortly before, or after the policy was issued, and in some of them they were held admissible as parts of the *res gestæ*.

On the other hand, where a policy was for the benefit of a wife, it was held that the admissions of the husband, who was the insured, made after it was issued, were not competent, upon the ground that they were the declarations of a stranger, who was neither a party to the action, nor, at the time of making them, the agent of a party. Bliss on Ins., 631–3, sec. 372; citing 7 Ohio, 292; 10 Kansas, 525, and other cases. After reviewing the cases the author says: "The views adopted in the cases cited from Ohio and Kansas seem most in accordance with correct principles." Bliss on Ins., 634. And this view of the question was adopted by this court, in an elaborate opinion, and upon a careful review of the authorities, by Judge McFarland, at Jackson, at April term, 1872, and reported in 9 Heis., 606.

The declarations offered to be proved in this case were made, as stated in the offer, some, several months, others several years after and before the policy issued, and of course there can be no pretense that they were parts of the *res gestæ*. We therefore hold that there was no error in rejecting the evidence of the declarations of Blount Morris as to his health and age, made before and after the policy issued.

Exception has also been taken to the Judge's charge to the jury. After stating to the jury that plaintiff would be entitled to recover if certain facts are established, "unless," in the language of the Judge, "the proof *positive*, show that Blount Morris made false or fraudulent answers to the questions that were put to him in the policy, or suppressed some facts in regard to his health, age, habits or circumstances in life. If he did this and the proof show it, then the plaintiff ought [not] to recover."

The objection to this part of the charge is, that it seems to require that incontrovertible evidence of the fraudulent or false representations should be made, whereas, nothing more was required than a preponderance of evidence.

It has been held by this court that the burden of proof is upon the insurer, when the question is whether the answers of the insured are false or fraudulent, and they must show these facts affirmatively.

Although in some of its accepted significations, the word "positive" might be considered as too strong an expression, in the connection in which it was used, yet we think it was used and intended to express the idea that the facts stated should be affirmatively proved by defendant; and besides, there was no evidence in the record that the answers were false or fradulent, to which to apply the charge.

Upon the whole, we are of opinion that there is no error in the record, and the judgment will be affirmed.

3L 106
3pi 725

J. NILSON TAPPAN, Trustee, etc., *v.* WESTERN & ATLANTIC RAILROAD CO. *et als.*

SISTER STATE. *Jurisdiction. Pleadings and Practice in Chancery.* A sister State cannot be sued in the courts of Tennessee without her consent. But if she appears and submits to the jurisdiction of the court, she must abide the decree made on the original or amended bill. But the charges of facts in the amended bill must be germain to and have a connection with the original bill, and must be necessary to supply some defect or failure of statement of complainant's rights as therein set forth, otherwise a demurrer will be sustained to the amended bill for want of jurisdiction.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

KEY & RICHMOND and BARTON & SON for complainants.

VAN DYKE, COOKE & VAN DYKE and N. J. HAMMOND for defendants.

FREEMAN, J., delivered the opinion of the court.

The original bill, filed in October, 1876, was an attachment bill, filed against the Western and Atlantic Railroad, and Western and Atlantic Railroad Company, to enforce the collection of about $33,000, on notes alleged to have been given in 1870, by Foster Blodget, then Superintendent of the Western and Atlantic Railroad, given in the State of Georgia, to-wit, at At-

lanta, and which are assumed to have been obligations of the Railroad Company. This company is charged to have been regularly incorporated, with power to sue and be sued, and built by the State of Georgia, which is its sole owner, extending from Atlanta in said State to Chattanooga, in the State of Tennessee. The road, at the date of the notes sued on, was run and operated by the State of Georgia, as is charged, under and by her regularly authorized agents.

The Western and Atlantic Railroad Company is a corporation, different from the railroad, incorporated in 1870 or 1871, and is charged to have leased the railroad from the State of Georgia for a term of years, which lease has some years yet to run.

This Company has an agent, who represents it, in this State at Chattanooga. The Western and Atlantic Railroad has no resident agent in this State, and is charged to be a non-resident.

The bill attaches about eight acres of land of the company in the city of Chattanooga, and the road bed, right of way, and fixtures of the road for about twelve miles in this State, that is, from the Georgia State line to Chattanooga.

The assumed grounds of liability of the Railroad Company on the notes, are fully set out in the bill, which we need not go into here.

The State of Georgia, by her Governor, filed her petition in December, 1876, in which it is claimed that the entire property attached was owned solely and exclusively by the State of Georgia; that there was no such person or corporation in existence as the Western

and Atlantic Railroad, nor was there at the time of filing complainant's bill. The State asked to be allowed to become a party to said bill, and be allowed to defend, and take such steps in said cause as she should be advised might be proper in the premises, which was allowed, and the State permitted to make proper defenses to said suit, as if originally a party. Thereupon the State filed a demurrer to said bill, which on hearing by the Chancellor was overruled, and the State allowed time to file her answer.

The answer was filed 28th December, 1876, and presents an elaborate and full statement of the grounds of defense by the State to the claims of complainant, as set out in the bill.

On the 22d of January after this, complainant asked leave to file an amended bill, which on being read in open court, was allowed by the Chancellor.

To this amended bill a demurrer was filed by the State of Georgia, and Western and Atlantic Railroad Company, which was sustained by the Chancellor, and the same dismissed; from which decree the complainants appeal to this court.

The only question now before us, is the correctness of this decree dismissing the amended bill.

The amended bill, after reciting the substance of the charges of the original bill, the fact that the State of Georgia had been allowed to appear and defend the same, the filing of an answer by the State, giving its substance, then proceeds to state, that the complainant is owner of a large amount of bonds issued by the State of Georgia, and others, on which the State was

liable as guarantor for various railroad companies in said State. A portion of these bonds are alleged to have been issued to raise money for building the Western and Atlantic Railroad, in pursuance of statutes of the State, and negotiated in the market for this purpose, and are said to have been signed by the then Governor of the State, and also by the President of the Board of Commissioners for the construction of said road. These bonds are called "scrip," or "stock," or bonds of the State of Georgia, but as they are not set out, their precise form we are unable to see, except that they were signed by the President of the said Board of Commissioners. It is claimed that the money received for these bonds was used to build said road, and on this is based the conclusion, that in equity complainant has a lien on the road, it having been built, says the bill, with the money arising from the sale of the bonds.

It is also claimed the Western and Atlantic Railroad is also liable for these bonds, because of the signature of the same by the President of the Board of Commissioners.

There are other allegations in the bill, but the above statement is sufficient to raise the questions now to be decided between the State of Georgia and complainant, and the Western and Atlantic Railroad Company, the lessee of said road, these being the only parties before us on the appeal. It is proper to say, that no additional matter is alleged against the lessee, nor is any relief prayed against that company in the amended bill.

The State of Georgia assigns for cause of demurrer, the following: "Said bill on its face shows the State of Georgia is one of the Sovereign States of the United States of America, and is not liable or subject to be sued, arraigned or impleaded in the courts of Tennessee, and therefore insists she is not bound to submit to the jurisdiction sought to be exercised." This is formally stated in said demurrer, but the above is the real point of defense.

The question raised is one largely dependent, on the facts in the record, that is, whether the matter of the amended bill can be treated or adjudged to be matter of amendment to the original bill, in any proper legal sense, on sound principles of law. The State of Georgia having voluntarily appeared and submitted to the jurisdiction of the court for the defense of her assumed claim to the property attached under the original bill, would, on well-settled principles, be bound to submit to all proper matters of adjudication involved in that litigation, in favor of complainant. Any amendments necessary to supply defects in statement of facts germain to and appropriate to sustain the claims asserted in the original bill, would become a part of that case, and she be held to meet such matter. It could not be maintained, that a State, after becoming a party to a suit, could insist that the pleadings should not be so amended, that the rights of the complainant could be properly and fully presented for the adjudication of the court. All the rights of the complainant in the way of amendment necessary to the complete and full development

of the claim asserted in the original bill certainly remain to him, after the intervention of the State of Georgia, as fully and completely as if the suit had been between citizen and citizen. This we think all very clear.

But the question is, whether the charges of fact in the amended bill are germain to, or have any connection whatever with the matter of the original bill, so as to be legitimate matter of amendment to the same, or are in any way necessary or even proper in order to supply any defect or failure of statement of complainant's rights as therein set forth?

While it is true, as said by this court in the case of *Bradley* v. *Dibbrell*, 3 Heis., 524, "the original and amended bill are to be taken as one when relating to the same subject matter," yet the statement of the rule implies the principle that underlies what is appropriate matter of amendment, that is, that it be something having connection with and germain to the matter of the original bill.

Tested by this principle, it is clear that the liabilities of the Sovereign State of Georgia on her bonds issued probably thirty years since, or on guaranties of like bonds of later date, bear no possible relation to the matter involved in the original bill, to-wit, liability on promissory notes issued by Blodget, as superintendent of the Western and Atlantic Railroad in 1870. This is especially so in view of the fact charged in said bill, that put the complainant's case largely on the ground that Henry Clews & Co. (whose trustee complainant is), were purchasers for value before due,

and therefore the notes were not subject to equities in their hands, with other matters peculiar to the case of said notes. In any event it is beyond question, the matter of the amended bill, so far as the State of Georgia is concerned, as a sovereign State, is not matter of amendment to the matter of the original bill, but is matter of an independent character, which may or may not be fit for an original bill. If we should sustain the view of complainant in this case, it would involve the proposition, that you might sue a party in this State on one case, and if a State chose to intervene to defend her right in property sought to be appropriated, as she assumed wrongfully, thereby the complainant secured the right to sue the State on all her outstanding bonds, be they much or little. In the aspect in which this case stood at the time of filing this amendment, this would be a fraud and surprise on the State, which no court could encourage or tolerate. The State of Georgia simply intervened to defend her claim of right to protect property attached, in which she claimed to have exclusive ownership, she had filed an answer making issues on the rights put in issue by complainant. Thereupon complainant stands in the attitude of saying, it may be the original cause of suit cannot be maintained, but I find I have another case on which I may be successful, and the State being in court to try the matter of the original claim, must submit to be sued to any extent desirable.

It is hardly necessary to cite authorities in support of the proposition, that a State of this Union, is as

to any other State a foreign and independent government; whether sovereign in the fullest sense of the term, we do not stop to inquire. No State can be sued in its own courts, except by its consent, and certainly cannot be impleaded in a foreign State, against its consent. These are axiomatic princiles of jurisprudence, about which there can be no doubt or debate.

It is proper to say, that we do not deem it necessary to examine the able and ingenious argument of the learned counsel, based on the distinction between a State in its governmental character, and that of a State engaged in commercial or trading transactions. The learning on these questions would be interesting, but the application of the distinctions presented is not seen, as the case stands before us. The State of Georgia is sued simply on its bonds, as a State, and on its guaranty of bonds issued by Railroads within her borders, in pursuance of authority granted by the Legislature. She comes before the court solely and alone, in her capacity as a State, and pleads to the jurisdiction of our courts over her as an independent State. That plea has been sustained, and we are asked to reverse this, and hold that she, as a State, may be sued in our courts. This we cannot do, without overturning, or disregarding principles long established, and so well-grounded in reason and the philosophy of the law, as to be impregnable to attack. We hold, the court below ruled correctly and affirm his judgment.

The decree is equally correct as to the Western and Atlantic Railroad Company. There is no ground

assumed in the amended bill, on which any liability in connection with these bonds can by possibility attach to this company, nor is there any prayer for relief against the company touching any of these bonds; and even if this might possibly be made out, it would not be pertinent to or germain to the matter of the original litigation, and ought not to be complicated with it.

What, if any, may be the rights of complainant against the Western and Atlantic Railroad, in an independent suit brought upon the liability of said road, based on the assumed signature of the President of the Board of Commissioners of Construction, we need not enquire, as that matter is not before us. We only decide the matters arising on the demurrer of the State of Georgia, as such State, and of the other company. These are the only matters presented for adjudication on this record. For these, and other reasons that might be given, we affirm the decree of the Chancellor dsmissing the amended bill with costs.

3L 115
10L 366
1pi 134
4pi 765

J. J. COULTER *v.* WEED SEWING MACHINE COMPANY.

1. SUIT BY NON-RESIDENT. *Ignorance of law.* A citizen of another State, who is a party to a suit in this State and appears by counsel from its inception, cannot claim an election in the mode of trial, based upon his ignorance of the law of this State.

2. PRACTICE. *Right to jury waived by cause remaining on non-jury docket.* Although a party to a suit brought into the Circuit Court by appeal from a Justice, enter of record a demand for a jury trial, he may waive that right by allowing the case to remain on the non-jury docket, and failing to call the attention of the court to his demand at the proper time.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. JOHN B. HOYLE, J.

DEWITT & SHEPHERD for Coulter.

BAXTER & BARTON for Company.

COOPER, J., delivered the opinion of the court.

The Weed Sewing Machine Company brought this action before a justice of the peace, on a note given by J. J. Coulter for a sewing machine. The defense was a failure of consideration, by reason of the worthlessness of the machine. The justice gave judgment for the defendant on the 5th of May, 1877. On the same day, the Sewing Machine Company prayed an appeal to the Circuit Court which was granted, and the appeal perfected by the execution of the proper

bond on the same day. The case was tried on the 3d of April, 1878, by the Circuit Judge, without a jury, and a judgment rendered in favor of the company, from which Coulter appealed in error.

It is assigned as error, that the finding of the Judge was against the weight of evidence. But there is evidence to sustain his judgment, and, under the uniform rulings of this court, we cannot interfere.

The other error relied on is, that the Circuit Judge ought to have sustained the application of the plaintiff in error for a trial by jury, or his motion for a new trial, in order to give him the benefit of a jury. When the case, which was and had been on the non-jury docket, was called for trial, the plaintiff moved the court to transfer the case to the jury docket, and sustained his motion by his own affidavit to the effect that he was, and had been for more than forty years, a citizen of the State of Georgia, and did not know until the case was called for trial, of the act of 1875, ch. 4, which requires either party who desires a jury, in the case of an appeal from the justice, to demand a jury "within the first three days of the trial term." This affidavit conceded on its face that the trial term, within the meaning of the statute, was the May term, 1877, of the Circuit Court, which begun on the 7th of May, two days after the appeal. Under these circumstances, the Circuit Judge very properly ruled that the application for a jury came too late. The record shows that the plaintiff in error was present, with his counsel, at the trial before the justice of the peace, and however ignorant he may have been of the Ten-

nessee law, it cannot be pretended that his counsel was ignorant of it. The law of a foreign State is a fact of which a litigant in a suit in his own State may require proof, and have no knowledge. But it has never been supposed that a party to a suit, whether citizen or stranger, can claim any benefit by reason of his ignorance of the law of the State in which the suit is brought. Few trials would stand if such a claim could be entertained.

After the trial, the plaintiff in error sought, by affidavit, to correct the concession of his former affidavit that the May term, 1877, was the trial term of the case, by showing that the justice did not file the papers until the 18th of that month, and produced record evidence of an entry on the second day of the next term, that he demanded a jury. But he cannot put the Circuit Judge in error by his own mistakes. Whether the May term was the trial term or not, within the meaning of the act of 1875, the demand for a jury was waived by allowing the case to be continued for several terms on the non-jury docket, and failing to insist upon the demand at the proper time.

Affirm the judgment.

3L 118
1pi 368

CHALFANT, COX & CO. *v.* J. M. GRANT *et als.*

PARTNERSHIP. *Assets. Creditors. Homestead.* The creditors of a firm have the right to follow the firm assets into land bought with the purchase money of other land in which the assets were first invested, and the partner making the investment cannot claim a homestead exemption in such land as against the firm creditors.

FROM M'MINN.

Appeal from the Chancery Court at Athens. W. M. BRADFORD, Ch.

W. L. HARBISON for complainants.

J. H. GAUT for defendants.

COOPER, J., delivered the opinion of the court.

The defendants, J. M. Grant and his two sons, were partners in business as merchants, and failing, sold their stock of goods, receiving in part payment a house and lot, and J. M. Grant occupied the premises with his family. Two years afterwards he sold and conveyed this property, his wife joining in the deed on the express agreement that the proceeds of sale, $900, should be used in purchasing a home in the country for the family. The place in controversy was accordingly bought, and paid for with the money, the title being taken in the name of the wife. The complainants are

judgment creditors of the firm, and seek to reach the land for the payment of their debts.

The house and lot having been bought with partnership assets, it is not disputed that the complainants would have the right to follow those assets into the property. It is argued, however, that the right goes no further, and that the creditors could neither reach the money arising from the sale of the lot, nor the land purchased therewith. In support of this position, *Tubb* v. *Williams*, 7 Hum., 367, is relied on. But if the language of the learned Judge in that case was ever intended to convey such a meaning, which may be doubted, it has been expressly overruled in *Lazell* v. *Powell*, Thomp. Cases, 198. And since the act of 1832, ch. 11, (Code, sections 4282–4287), stocks, choses in action and money due, may be reached in equity by judgment creditors, and, of course, property in which the money may be invested. And we have held at this term that there is no right of homestead in partnership property.

Affirm the decree with costs.

JAMES MATTHEWS *et al.* *v.* BLOUNT CO. & J. S. THOMAS.

1. CONSTITUTIONAL LAW. The act of March 18, 1875, entitled "An act to enable old counties from which fractions have been taken to form new counties, to appoint tax assessors for said fraction and to collect taxes therein," is constitutional.

2. CHANCERY PRACTICE AND PLEADINGS. *Averments of bill must be specific.* Bill alleging irregularities in the issue of bonds to a Railroad Company, should point out specifically such irregularities to call attention of the defendants to them and advise them of what they are to defend or explain.

FROM LOUDON.

Appeal from the Chancery Court of Loudon. O. P. TEMPLE, Ch.

PRICHARD, ROGERS and WELCKER for complainants.

MCGINLEY, HOOD, CATES and ROWAN for defendants.

TURNEY, J., delivered the opinion of the court.

The first question presented by the bill is as to to the constitutionality of the act of the Legislature, passed March 18, 1875, entitled "An act to enable old counties from which fractions have been taken to form new counties, to appoint Tax Assessors for said fraction and to collect taxes therein." The preamble to this statute is, "Whereas, by article 10, sec. 4, of the Constitution of the State of Tennessee, it is provided, that the fractions taken from old counties, in the formation of new counties, or taken from one county and

added to another, shall continue liable for their pro rata of all debts contracted by their respective counties prior to the separation, and to be entitled to their proportion of any stocks or credits belonging to such old counties, therefore to the end that said old counties may be better enabled to assess and collect taxes in the fractions taken from them, where such fractions are subject to such taxation by law."

The first section of the act provides for the appointment by the County Court of the old county, of a special tax assessor from the citizens of the old county, or in case there is one tax assessor only for the old county, it shall be his duty to assess all the taxable property and polls within the territory embraced in the fraction, etc. * * * And the tax collector or collectors of said old counties shall proceed to collect the taxes so assessed in said fractions as if said fractions were integral parts of the old counties for which they were appointed or elected tax assessors.

Section 3 provides, that the provisions of this act shall not apply to any other than railroad taxes, nor in any case when judicial proceedings are pending to ascertain the amount for which said new counties or fractions thereof are liable to the old counties, until said judicial proceedings are determined.

The county of Loudon was formed and organized under the Constitution of 1870, and of course subject to its ordinances.

The act of March 18, 1875, is simply an enabling act to article 10, sec. 4, of the Constitution, and is intended to furnish a remedy for the enforcement of

the rights defined and declared by it. Its passage was, therefore, not only within the power of the Legislature, but strictly within the line of its duty.

In this bill there is no allegation that at the time of the effort to collect railroad taxes, judicial proceedings were pending to ascertain the amount for which the "Blount fraction" of Loudon county is liable to Blount county, therefore the allegation, "that there has never been a settlement between the county of Blount and the said Blount fraction for the purpose of ascertaining the amount," etc., is immaterial, and presents no issue that the courts are authorized to inquire of.

The statute expressly and in terms providing that such proceedings must be pending at the time of the undertaking to collect, unless such proceedings are so pending it is the duty of the collector, as prescribed by the statute, to collect the taxes due from the fraction as if there had been no separation from the old county.

By virtue of the act it is the duty of the County Court of the old county to provide for the appointment of a tax assessor—of the assessor to assess the taxes, and of the collector to collect. Nor is it in any way provided that the tax payers of the fraction shall have a voice in the choice of either assessor or collector, or the levying of the taxes. The levying, assessing and collecting must be done as if the old county were at the time entire, and the rate of taxation must be uniform.

The broad allegation, that "in the subscription of said stock and in the issuance of said bonds, there

are many gross irregularities, which as between the tax payers of the Blount fraction and Blount county should stand as a complete barrier to the collection of any such tax by said county," furnishes no information to the parties sued, of the grounds of complaint against them. Such irregularities should have been specifically pointed out in a way to call the attention of the defendants to them and advise them of what they were invited to defend or explain. This comprehensive charge performs no part of the office of pleading and cannot be regarded by the courts.

The same answer meets the allegation, "That said stock was subscribed by the people of Blount county upon certain conditions, stipulated and positively and pointedly set forth in the orders of the County Court of Blount county, in the acts of the Legislature of the State authorizing the subscription and issuance of the bonds, and finally set forth and referred to in the face of the bonds themselves." Such conditions and stipulations and their breaches should have constituted a part of the allegation.

It is alleged in this connection, "That should there be a failure to construct said Knoxville & Charleston Railroad through Blount to Knoxville, then the county subscription of Blount county shall be void. This condition will be found fully and explicitly set out in the orders of the court, in the statutes authorizing the subscription and the issuance of the bonds, and is referred to on the face of the bonds and made part of the same. * * * That this condition has never been complied with," etc.

This allegation is intended to give to the language, "through Blount county to Knoxville," a literal meaning, and is not meant to convey the idea that the road does not in reality run through Blount county, as we judicially know that it does run from the county seat of Blount county to Knoxville.

The several charges in the bill, to the effect that the bonds are void in the hands of their holders, because their faces show the conditions and limitations by which they were guarded in their issuance, can avail nothing in this suit, for the reason that the holders are not before the court.

The same rule obtains in relation to the charges against the railroad officials as to their conduct and use in the appropriation and disposition of the bonds.

It is charged that about the year 1854, the County Court of Blount county issued bonds to the amount of $120,000, in payment of a county subscription to K. & C. Railroad. That said bonds remained in the hands of said County Court uncalled for by the R. R. Co. until 1865, when by an order of the County Court the bonds were burned and the county thus returned *statu quo*." "Afterwards, about the year 1867, a heavy pressure was brought upon the County Court by R. R. Co. for the re-issuance of said bonds." * * "That the County Court did issue bonds to the amount of $120,000, believing it was bound to do so, and the same were turned over to R. R. Co."

This latter action of the County Court is charged to be illegal.

From these allegations it appears the county was

indebted by its subscription in the sum of $120 000; that the County Court, under authority of law, prepared bonds for the payment of the debt; that it retained instead of paying out the bonds because they were not called for, and not being called for the County Court ordered them to be cancelled by burning. Did this destruction of the bonds extinguish the debt, looking to the allegations of the bill? We think not. The people of the county, pursuing a legislative direction and authority, had contracted the debt; this being done, it was the duty of the County Court to issue the bonds as the statute provided. This being done, its authority was ended. The debt having been legally created must be paid, the burning was an unauthorized act. The re-issue was a compliance with the duty imposed by law upon the court. The destruction of the first bonds by the order of the tribunal that ordered their issuance, left the matter in precisely the condition as if no such bonds had been in fact propared in the first instance. The demurrer should have been sustained.

Reverse the decree and dismiss the bill.

JOS. M. THOMPSON *et als.* *v.* THOS. K. THOMPSON, *et als.*

VENDOR'S LIEN. *Statute of limitations.* A third person to whom a portion of the purchase money of land is, by the terms of the grantor's deed, to be paid by the vendee, has, in the absence of an express reservation of lien, the vendor's lien or equity on the land for the payment of the money, but the lien will be barred by the continuous possession of the land by the vendee for seven years from the maturity of the debt.

FROM RHEA.

Appeal from the Chancery Court at Washington. D. M. KEY, Ch.

S. E. CUNNINGHAM and S. J. A. FRAZIER for complainants.

J. C. PYATT and J. R. NEAL for defendants.

COOPER, J., delivered the opinion of the court.

On the 18th day of October, 1857, Thomas Thompson conveyed by deed of that date to the defendants, Thomas K. Thompson, Margaret A. Thompson and Priscilla L. Thompson, his children, a tract of land "for and in consideration and payment" by them of $200 to the complainant Joseph M. Thompson, another child, of $150 to Stephen A. Thompson, another child and the father of the other complainants, and of other moneys to other persons, all of the payments to be made within three years from the date of the deed. The deed was absolute without reserving any lien for the payment of the purchase money. The grantees

went immediately into possession of the land, and have remained in possession ever since. This bill was filed on the 31st of July, 1875, to recover the two sums of money which were to be paid to Joseph M. Thompson and Stephen A. Thompson respectively, and to subject the land conveyed to the satisfaction of the recovery. The only material facts stated by the bill, in addition to those recited above, are that the defendant Thomas K. Thompson has repeatedly, within the last six years, promised to pay the $200 and interest due to complainant Joseph M. Thompson, and that Stephen A. Thompson, the father of the other complainants, is dead. The above named defendants demurred to the bill, but the demurrer was overruled. The defendants then answered the bill. On the final hearing the Chancellor sustained the bill, and the defendants appealed.

The deed of the 18th of October, 1857, is, in form and substance, a sale of the land therein mentioned to the grantor's three children, in consideration of certain money payments to third persons, and, among others, of $200 to complainant Joseph M. Thompson, and $150 to Stephen A. Thompson, the father of the other complainants. The acceptance of the deed by the defendants as grantees, it has been held by this court, made them liable to the third persons named for the respective amounts mentioned, as for their own debts, and this without any promise in writing signed by them, the promise not being within the statute of frauds. *Moore* v. *Stovall*, 2 Lea, 543. Such third persons, it has also been held, would have a

vendor's lien on the land for the security of the payment, althongh the sale be absolute without the reservation of a lien by contract. *Hamilton* v. *Gilbert*, 2 Heis., 680. But the implied lien or equity of the vendor, it has long been settled, is barred by the statute of limitations of seven years. *Sheratz* v. *Nicodemus*, 7 Yer., 8. There being no lien on the land, the remedy for the recovery of the debt was clearly at law, and the demurrer, of which this was one of the assignments, should have been sustained. It should also have been sustained as against the children of Stephen A. Thompson, on the ground assigned that the bill showed that the debt was barred by the statute of limitations. It may be added that the evidence fails to satisfy us that there has been any such promise on the part of the defendant Thomas K. Thompson to pay the debt of Joseph M. Thompson as would be binding on him.

The decree must be reversed, and the bill dismissed with costs.

WM. MORROW, Adm'r, *v.* F. L. FOSSICK *et als.*

PARTNERSHIP. *Foreign. Chancery practice and pleadings.* A creditor having attached a debt as due to his non-resident debtor, the money was paid into court, and the debtor put in a plea that the fund was not his property, but the property of a non-resident firm of which he was a member, whereupon the creditor filed an amended and supplemental bill against the members of the firm to ascertain the interest of the debtor in the fund, and the defendants moved to dismiss the bill upon the ground that the court had no jurisdiction of the person of the defendants. Held, that the motion was not well taken. *Semble*, the court would have jurisdiction to take an account of the foreign partnership, if necessary to ascertain the interest of the debtor in the fund.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. O. P. TEMPLE, Ch.

GEORGE WASHINGTON for complainant.

A. S. PROSSER and HENDERSON & JOUROLMON for defendants.

COOPER, J., delivered the opinion of the court.

On the 11th of September, 1876, the complainant, as a creditor of F. L. Fossick, filed this bill against his debtor as a non-resident of the State, and one Woodruff, to attach the indebtedness of Woodruff to Fossick, and subject it to the satisfaction of his debt. The debt was attached, the amount admitted by Woodruff and paid into court. On the 26th of September the defendant Fossick entered his appearance and was

allowed time to answer. On the 11th of November the Chancellor, for some reason not appearing nor apparent, vacated the entry of appearance and allowed Fossick to file a plea in abatement to the effect that the fund attached was not his property, but the property of a firm composed of himself and his two sons, F. L. Fossick, jr., and G. E. Fossick, doing business in the State of Alabama. . Thereupon the complainant obtained leave of the court, and on the 16th of February, 1877, after Woodruff had paid the money into court, filed an amended and supplemental bill against the members of the firm, charging that a large part if not all of the fund attached belonged to the original defendant and debtor, and asking "that the affairs of said firm, if firm it be, be settled" in the Chancery Court, and the debtor's interest be ascertained and appropriated to the satisfaction of complainant's debt. The bill further prayed that the fund in controversy be held subject to the further orders of the court, and, if proper, that another attachment issue to be levied on the individual interest of the debtor in said fund. The defendants, the Fossicks, each for himself entered a motion to dismiss the amended and supplemental bill because it showed "that the court had no jurisdiction of the person of the said defendants, or any one of them." The Chancellor sustained these motions and dismissed the bill.

When a complainant has preferred his bill and is advised that the same does not contain such material facts, or make all such persons parties as are necessary to enable the court to do complete justice, he

may alter it by inserting new matter, or by adding such persons as shall be deemed necessary parties, or both. And although it is the practice to call a bill thus altered an amended bill, the amendment is in fact esteemed but as a continuation of the original bill, and as forming part of it, for both the original and amended bill constitute but one record. 1 Dan. Ch. Pr., 402; *Vere* v. *Glynn*, 2 Dick., 441; *Catton* v. *Carlisle*, 5 Mad., 427; *Hurd* v. *Everett*, 1 Paige, 124; *Wilkinson* v. *Fowlkes*, 9 Hare, 198, 594; *Bradley* v. *Dibrell*, 3 Heis., 522; *Wilson* v. *Beadle*, 2 Head, 512. The object of the original bill is to subject to the satisfaction of the complainant's debt the interest of the debtor in the fund upon the supposition that he is entitled to the whole of it. The object of the amended bill is the same, still asserting that the defendant debtor is entitled to the whole fund, but, upon an alleged claim by the other defendants, asking that their claim be inquired into, the interest of the debtor ascertained and subjected. In this view the new bill is, beyond all question, a mere amendment as to the original debtor, and a motion by him to dismiss on the merits would not lie. If, too, the amended bill can be considered as still asserting the debtor's right to the fund, and disputing the question of partnership between the defendants, a motion to dismiss on the merits would not lie by any of the defendants.

But the motion to dismiss is not rested on the want of jurisdiction over the subject matter of the litigation, but because the court had no jurisdiction of the person. So far as the original debtor is con-

cerned, this motion is clearly not well taken. He is in court by virtue of the original attachment, and the payment of the fund attached into court, both bills expressly asserting that he has the whole interest therein. As to the two other defendants, the jurisdiction of the court over their person depends upon the Code, sec. 4311, sub-secs. 4 and 5. Sub-sec. 4 is: "Bills against non-residents may be filed in the district in which the subject of the suit or any material part thereof is." The subject of this suit being the money attached, is impounded in the court in which the bill is filed, and in the very suit in which the bill sought to be dismissed is an amended pleading. Sub-sec. 5 is: "Whenever attachment of property is allowed in lieu of personal service of process, the bill may be filed in the county or district in which the property, or any material part thereof sought to be attached is found at the commencement of the suit." The attachment already sued out as to the debtor is sufficient to give the court personal jurisdiction as to him under the new bill, which is merely an amendment of the original bill so far as he is concerned. Moreover, the fund being already in court, the prayer that it be held subject to the order of the court probably dispenses with a formal attachment, which could not be levied without permission of the court. If this impounding is equivalent to attachment, the jurisdiction of the court over the person of all of the defendants is secured, and certainly possession of the subject matter of the suit gives such jurisdiction.

In this view the question of real difficulty in this cause is not now before us, and that is whether a court of chancery of this State can so far take jurisdiction of a foreign partnership as to ascertain whether one of its members has such an interest in funds attached by his creditor, but claimed by the firm, as may be subjected to the satisfaction of the creditor's debt. The right of the creditor to seize the firm property, either by execution or attachment, for the debt of the member of the firm, and sell or appropriate the debtor-partner's interest, and, ordinarily, to file a bill in advance of sale to ascertain that interest, is conceded. *Haskins* v. *Everett*, 4 Sneed, 531; 1 Sto. Eq. Jur., sec. 677. The objection is that the court has not sufficient control over the partners, their books and business, to effectually exercise the jurisdiction in the case of a foreign partnership. But the court has control of the fund in controversy, which it can appropriate at any time to the satisfaction of the creditor's demand, unless the proper accounts are furnished, and proper facilities tendered for taking the account. Of course it would be unreasonable to require the partnership books to be produced, or the partners to be brought to this State. But I see no difficulty which may not readily be overcome in assuming the jurisdiction, if the creditor chooses, after the disclosure by answer to which he is entitled, to risk the expense of having the books examined by experts, and taking the necessary proof, with access to the books, at the place of business of the firm. Theoretically, the subject seems to bristle with difficulties,

while practically there would be little more difficulty than would attend a similar account of a domestic partnership. The probability is that in the majority of cases the partnership interest of the member would be fairly stated in the answers, or be shown by the balance sheets produced, and the litigation terminated. At any rate, I am unwilling to concede that a court of chancery cannot successfully grapple with the supposed difficulties, and I am unwilling to deprive a creditor of any means afforded by the law to obtain satisfaction of his debt from the property of a reluctant debtor. I am still more unwilling to force a home creditor to resort to a foreign forum for the recovery of his debt, when the case presented is one over which the court would clearly have jurisdiction if the partnership were domestic, though located in a distant county from that in which the suit is pending.

The decree of the Chancellor will be reversed, and the cause remanded for further proceedings.

FREEMAN, J., delivered a dissenting opinion.

In 1876 complainant filed an attachment bill in the Chancery Court at Knoxville claiming a debt due individually from F. L. Fossick, a resident of the State of Alabama. It was charged that the debtor had no property in the State known to complainant except a debt due from W. W. Woodruff, and this debt was attached. Woodruff answered, but it turned out the debt was shown by him to be due not to F. L. Fossick individually, but to a firm in the State of Ala-

bama known as F. L. Fossick & Co., composed of F. L. Fossick and his two sons, we believe, engaged in some business connected with the sale of marble in some of its forms. F. L. Fossick appeared by attorney and filed a plea that said attachment had not been levied by garnishment or otherwise upon the property, estate, or effects of himself, that he had no property in the State subject to process of attachment, but that the debt attached as due from Woodruff was not due to defendant, but to the firm of F. L. Fossick & Co., giving the name of the firm, and that they were doing business in the State of Alabama, and all non-residents of the State of Tennessee. This plea stands to the original bill, no disposition having been made of it by the court, or its action invoked upon it in any form.

Complainant, however, asked and obtained leave of the court, and did file what is called an amended and supplemental bill, but which is in fact, as I think, only an original bill against the firm of F. L. Fossick & Co., seeking to wind up and settle said firm in our State, based on the fact alone that one of the members of the firm owed complainant an individual debt, and that on information and belief there would be found a balance in his favor on taking the partnership account which complainant insisted to have applied to his debt.

A motion was made by attorneys of defendant to this bill to dismiss for want of jurisdiction of the persons of the defendants, which was sustained. From this decree alone an appeal in error is prosecuted to

this court. The action of the court on these facts is alone before us.

The supplemental matter in this case is nothing more than the fact of a partnership charged, the names of the partners, where the firm is, to-wit, in Alabama, with an averment of belief that on settlement of the firm a balance will be found in favor of the individual debtor, and a prayer for discovery of the terms of the partnership, the amount of the capital put in by each, and then a prayer that the firm be settled up, account had of its condition, and ascertainment of the interest of the debtor, and then an appropriation of that interest to complainant's debt.

This court has held that the interest of a partner in a firm may be sold for his individual debt. *Haskins & Reynolds* v. *Everett*, 4 Sneed, 532. The court says, in giving that opinion, "The purchaser, however, only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, and not in proportion of the property sold. What that interest is cannot genally be ascertained until a final settlement and adjustment of the partnership concerns. The effect of the sale and purchase is only to place the purchaser in the shoes of the partner whose interest he buys, and make him a tenant in common with the other partners. This is a necessary consequence of the rule that each partner has a lien on the partnership property as well for the debts due by the firm as his own share and proportion thereof. The judgment creditor or purchaser must take the interest sold subject to all such liens and

claims. To ascertain the interest sold, the purchaser or the other partners may file a bill for the settlement of the partnership." The court adds, "The great uncertainty of the value of this interest does not effect the principle."

If the creditor chooses to avoid this he may, or the sheriff, with his consent, may file a bill in advance of the sale and ascertain with exactness the interest of the partner before the sale. The court, however, is here treating the case of levy of an execution which is necessarily based on a judgment, and involves the necessity of jurisdiction of the parties.

Judge Story lays down the same doctrine with more distinctness in vol. 1, Eq. Jur., sec. 677. In such case, he says, "the judgment creditor can levy not on the moiety or individual share of the judgment debtor in the property as if there were no debts of the partnership or lien on the same for the balance due to the other partner, but he can only levy on the interest of the judgment debtor, if any, in the property after payment of all debts and other charges therein." He then goes on to say that the sale does not transfer any part of the joint property to the vendee so as to entitle him to take it from the other partners, for that would be to place him in a better situation than the partner himself. But it gives him, properly speaking, a right in equity to call for an account, and thus entitle himself to the interest of the partner which shall, upon such settlement, be ascertained to exist.

Mr. Parsons, in his work on partnership, in the

discussion of the question of attachment of the interest of a member of a firm, lays down the general rule to be "that the separate interest of a partner is not open to an attachment in a foreign jurisdiction. He suggests reasons why circumstances might create an exception to the rule (see secs. 355–6), then gives as his conclusion that such an interest ought to be held subject to such process. Sec. 357. But he does not intimate that more than this interest can be so attached, nor does any decision or writer that we have seen hold such a view. It would be contrary to principle, as well as unjust, it appears to us, to hold that the property of others could be attached because a man associated with them had incurred a debt.

If these principles be correct, and there can be no question, both on general authority and our own decisions, of this, then it seems clear to me this supplemental bill cannot be sustained. It is but an attempt by way of supplemental matter to have the account taken and firm settled up before or in order to an appropriation of the interest of the debtor when it can be ascertained. If the purchaser who buys what is levied on but stands in the shoes of the partner, it is because the levy but fixes on that interest and no more, for he gets all the officer takes, and the officer only gets, by the levy of execution, the interest of the partner—an attachment only fixes a lien on it. If the levy only puts the officer or the purchaser in the shoes of the debtor partner, the question is, could the partner, being a non-resident, come here and file a bill to wind up this partnership on

the facts alleged? This would not be pretended. Why? Simply because the court has no jurisdiction of the parties, and cannot get it. How is it possible, then, that a party with a simple lien fixed on the interest of the debtor can get higher than his debtor? The lien of the attachment gives the right to have the property or interest on which it is fastened sold when the debt is ascertained. When that sale takes place the purchaser only gets a right to an account and settlement of the firm. How can there be more in the creditor before the sale than goes to the purchaser under the sale?

If this be correct, then under the original bill you have all the parties before the court who has any interest in that litigation, that is the debtor. You seek to sell his interest, he is before the court when you levy on that interest, or it may be so assumed for this case. No decree can be made in that case against the other partners, nor is their title sought to be in any way effected; no claim of right is sought, or could be made against them. Why, then, should they be made parties? It can only be for a purpose not involved in the original suit, and that purpose is one to which they have the right to object, as they have done in this case, and resist the jurisdiction. The fact that what is sought is presented in the form of a supplemental bill to the original, and as part of that proceeding can make no difference. The essential fact remains that this is a bill by a party in this State to wind up a partnership in another State, filed against parties not within the juris-

diction of the court, and even when the court has no rightful control. If the original bill does not show that it is but the interest of the partner in the firm that is sought to be subjected, let it be amended in that reference, and so perfected.

The only party concerned in that question is the debtor who alone represents that interest, the creditor only taking or seeking to have a decree against his individual interest after the partner's interest has been separated from it, and a right on the part of the purchaser of such interest by being placed in the shoes of the debtor to have an account to ascertain what that interest is. The other partners are not necessary parties for the objects of the original bill; the purposes of the supplemental bill are such as the court has no power to effectuate or adjudicate against the claim of the parties.

I think the radical error of the majority opinion is in assuming that this court has jurisdiction of the subject matter of the litigation presented in the amended bill. The subject matter of the original bill is the debt due from F. L. Fossick to Morrow, with an attachment alleged to have been levied on his property. The subject matter of the amended bill is to wind up and settle the partnership between F. L. Fossick and his two sons in the State of Alabama. This firm has no local existence in this State, nor can the court get jurisdiction of its subject matter by levying an attachment on the property of F. L. Fossick, or claimed to be his. What right can a debtor of F. L. Fossick have to litigate with other parties in

order to sell his property? What possible subject matter of this firm has the court jurisdiction of? It is conceded and laid down by all authority that you can only levy on the individual interest of a partner for his individual debt. You cannot levy on the property of the firm for the debt of an individual partner. If this be so, then no attachment is on the property of the firm, nor is that property the subject matter of the litigation. The original bill nor the amended bill seek to appropriate the property of the firm, but only of F. L. Fossick. That is the subject matter of the litigation, and under cover of a claim against one partner, and an attachment against his property, by the holding of the majority, you acquire jurisdiction over another and different party, a non-resident of the State. On that principle you can always bring a party into court and get jurisdiction over him. You have but to levy an attachment on the property of a citizen, and then amend by making the party you wish a party by publication, and thus compel him to litigate with you in our courts. The simple question really in this case is, whether a debt due to a firm in this State gives or can give the court of this State jurisdiction to wind up the partnership because it is assumed the court has jurisdiction of it by reason of the levy of an attachment on the individual interest of a partner to pay his debt. Is this debt the subject matter of the partnership? I think not. The other members of the firm may well say, we do not dispute your right to sell the interest and property of your debtor, with that we have nothing to do; you

have no right, however, to make us parties to that litigation in your court. And I can see no answer to it. The levy of an attachment on the individual interest of the debtor-partner surely can give the court no jurisdiction over the firm of which he is a member, unless you hold a levy on one man's property will bring another into court. Yet this must be the basis of the jurisdiction, for there is no other fact in the record on which it can rest.

The principle is conceded as a matter of course that if a bill does not contain material facts, or make such persons parties as are necessary in order to enable the court to do complete justice, complainant may supply these defects by amendment. But to do complete justice can only mean to settle the rights of complainant and defendant, not the rights of complainant against other parties who are in this case not claimed to be debtors of complainant, and against whom no relief can be sought on the footing of having a debt against F. L. Fossick. He is the sole debtor, and his individual interest is alone to be affected by the decree. You can sell, but in doing so you can and do decree nothing against the other defendants. The effort, however, is, in this case, by selling the individual interest of F. L. Fossick, to give the court jurisdiction of the firm of F. L. Fossick & Co., and wind up a partnership existing in the State of Alabama. It seems to me the decree would be void when made under the late decision of the Supreme Court of the United States in the Oregan case, *Pennoyer* v. *Neff*, Rep. vol. 5, 358, which

holds that a State court can only take jurisdiction of parties non-resident to the extent of appropriating any property they may have within its jurisdiction, but that a personal decree against such parties is void for want of jurisdiction. This being so, if the parties resist or decline to submit to the jurisdiction, the decree has no force, and is useless; and if they decline to answer, and a decree *pro confesso* is taken, then how will you wind up the partnership? That is the object of the bill. You surely will not appropriate the entire property, that would be manifestly an outrage on justice. Would you, then, be compelled to do what I have maintained you ought to do, that is, sell the interest of the parties, whatever it may be, and leave the purchaser to assert his rights? Your effective jurisdiction at last depends on the consent of the defendants, so I think. If the object of the original bill and amended bill is to appropriate the whole debt from Woodruff, as being the property of F. L. Fossick, then it must stand on that ground, and maintain that to be the fact. If so, then, there is no need to introduce partners who have no interest on that assumption. If this is not the fact, and the partners have an interest as a firm, they are not before the court, and the court has no power to bring them before it. This can only be done by levy of attachment on their property, alleging a debt due from them, or by personal service, and neither is claimed in this case.

I conclude, for these reasons, the decree of the Chancellor should be affirmed.

V. A. GASKILL AND WIFE *v.* BADGE & EATON *et al.*

DEED. *Mistake in registration. Rights of purchaser at sale to enforce vendor's lien.* *Case:* Alley sold and conveyed to Agnew and Haselton a half interest in certain tracts of lands. The deed was registered, but in the registration a mistake was made in this, that instead of conveying "the south-east quarter of section three" as in the deed, it conveyed as registered "the south-east quarter of section eleven." A bill was filed by Alley to enforce his vendor's lien, in which the description of the registered deed was followed. A decree for sale was had, and land sold and purchased by Whiteside. It was understood by all the parties that the south-east quarter of section three was sold. The proceeds of sale did not satisfy the decree. Afterward the error in registration was discovered and correction made. Haselton, upon finding the mistake, purchased Agnew's interest, and upon execution being issued for balance of unpaid purchase money due Alley, the south-east quarter of section three was sold, and he became the purchaser. Held, that as Alley's deed to Agnew and Haselton conveyed to them this quarter section, and Alley had enforced his lien on all the land conveyed, that he never claimed and never had any title to the south-east quarter of section eleven, and as the incorrect description did not mislead any one, but all understood it as referring to section three actually conveyed, and not to section eleven, that Whiteside the purchaser was entitled to the south-east quarter of section three as against Haselton. It might be different as to a *bona fide* purchaser without notice.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

DEWITT & SHEPERD for complainant.

HYDE & BROWN, E. M. DODSON and NASH BURT for defendants.

Gaskill *v.* Badge & Eaton.

DEADERICK, C. J., delivered the opinion of the court.

Erasmus Alley sold, and on the 7th day of January, 1859, conveyed to Agnew and defendant Haselton a half interest in certain lands in Marion county, described in the deed.

March 10, 1859, this deed was probated for registration, and registered thereafter. The deed conveyed a number of tracts of mountain land, amongst others "the south-east quarter of section three," which is one of the chief matters of contest in this suit. This deed was registered incorrectly in two particulars: first it is made to bear date of January 29, 1859, and instead of mentioning "the south-east quarter of section three," as registered it purports to convey "the south-east quarter of section eleven." In all other respects the deed as executed and the registered deed are alike, the numerous tracts conveyed being the same.

Agnew and Haselton paid down $3,500, and executed their notes for $4,000. These notes not having been paid at maturity, Alley filed his bill to enforce his lien for unpaid purchase money, and obtained a decree for the sale of the lands. But as the bill was filed after the deed was first and incorrectly registered, and before the second and corrected registration, the land was described as described in a copy of the deed taken from the Register's office.

Haselton and Agnew appealed to the Supreme Court, where, in 1866, the decree below was affirmed, and the lands ordered to be sold for the payment of the purchase money, about $5,900 still remaining due and

unpaid. In the decree ordering the sale the lands are described as in the deed as first registered, and it is added, being the same lands conveyed by complainants to defendants by deed of January 29, 1859. The lands were sold, including the south-east quarter of section three, on which the Vulcan Coal Mine had been opened, and which constituted the chief value of the whole. The complainant, Mrs. Whiteside, then became the purchaser at $5,500, and the sale was confirmed in 1867, and a writ of possession awarded.

In December, 1867, defendants Badge and Eaton, being in possession as tenants of Haselton, the complainant procured a writ of possession to issue to the sheriff, and under it they were about to dispossess the said Badge and Eaton, who were then operating the Vulcan mine, when they attorned to her and agreed to pay to her the rents of the mine. They continued in possession under this verbal agreement, paying rent to complainant until June 1, 1870, when they entered into a written contract with her, agreeing, amongst other things, to pay twenty-five cents a ton for all coal mined, and to pay at this rate for six hundred tons every month, whether they mined that much or not, and this contract was for five years, with the privilege to Badge and Eaton to continue it ten years. After her purchase complainant claimed a half interest in the mines and lands, and as executor of her late husband, Whiteside, an additional one-eighth, the residue being owned by Boyce and Cravens.

It seems that the deed of Alley stood uncorrected, and as at first registered, until 1872, when it w-

correctly registered, all the parties in interest knowing, or assuming that Alley's deed conveyed the Vulcan mines (located on the south-east quarter of section three), and that the land was correctly described in said deed, and correctly registered, until in 1870, complainant having an offer to purchase said Vulcan mines, caused her counsel to make an examination into the title, etc., when it was discovered that Alley's deed, as registered, did not include the "south-east quarter of section three," and in April of that year, 1870, she procured a deed to herself from Alley for this quarter section, which was registered on same day. Haselton and Agnew were citizens of New York, and perhaps did not discover the mistake in the registration of Alley's deed to them until Haselton visited the Ætna Mines, in which he had an interest, and which are near the Vulcan Mine, in October, 1872. Then he had the deed again registered, in which the south-east quarter of section three appeared, instead of south-east quarter of section eleven, erroneously copied in first registration of 1859.

Mrs. Whiteside's bid for the land at the sale under the decree of this court was not, by several hundred dollars, the full amount of the decree in favor of Alley for his unpaid purchase money.

In 1873 Haselton procured a conveyance from the heirs of Agnew, and in 1875, or thereabouts, upon an execution being issued from this court for the balance of unpaid purchase money due Alley, the south-east quarter of section three was sold, and Haselton be-

came the purchaser. It is upon these facts that the claim of the contestants is to be settled.

Another fact in the case should, perhaps, be stated. The deed of Alley and the decrees of this court, ordering and confirming the sale, reserve to the Nashville & Chattanooga Railroad Company certain water privileges on the land ordered to be sold. The water to which such privileges are reserved is said by one witness not to be on the south-east quarter of section three, but five or six yards outside of it, but we think the weight of evidence shows that the water is upon the said quarter section.

In view of all the facts in the record, it is very clear that Alley's deed to Haselton and Agnew conveyed to them this quarter section; that Alley filed his bill to enforce his vendor's lien upon all the land conveyed; that he claimed no title to the south-east quarter of section eleven, and had none; that the sale for purchase money was designed to embrace only the land sold, and all the land sold, and that the misdescription of the quarter section in controversy in the proceedings to enforce the vendor's lien, occasioned by the incorrect registration of the deed, in the first instance, did not mislead any of the parties as to the land actually sold, but all seemed to understand it as referring to the section actually conveyed, and not to a quarter of section eleven. It is apparent, therefore, that no one having been mislead, no one is injured by the error, as the part misdescribed was nevertheless understood by all the parties as being intended and meant by the description given as fully as if it

had been described with literal accuracy. It is not a third person or innocent purchaser who is seeking to avail himself of the alleged error, but the original purchaser, in whose hands the lands were liable for the purchase money, and who acquiesed in the sale for years after it was made. If the said quarter section was not conveyed by said deed as first registered, then that deed being notice of what was sold, the title, although actually conveyed by Alley in the absence of notice of the true state of the facts, a bona fide purchaser might have gotten a good title from Alley before the correct registration of the deed.

Mrs. Whiteside took a conveyance from Alley in 1870, being in possession of the land under her purchase about two years before the deed of Alley to Haselton and Agnew was registered in its correct form, but it is not necessary to decide, and we therefore do not decide whether she acquired the title by this conveyance.

All the parties to the original transaction are before the court, and it would be inequitable to allow Haselton to take the title to the land for which Mrs. Whiteside has paid the purchase money, by reason of a mistake in the registration of the deed, which we have seen did not mislead any one, or occasion them any damage.

We conclude, therefore, that the Chancellor's decree on this branch of the case was correct, and should be affirmed.

In respect to the account for rents and appropriation of property attached, we are of opinion that as

to the rents, styled in the report "minimum" rents, that the balance of said rents be taken at $684.10, as stated by the master in his report.

As to the report of "maximum rents," the exceptions of defendant thereto should have been sustained, except to the extent of eighty-three tons, which should be charged.

Defendants Badge and Eaton should not be charged with the depreciation of property by ordinary use, and exception to this charge will be sustained, the complainants having left the property in their possession with liberty to use it without charge

With these modifications as to the matters of account, the Chancellor's decree will be affirmed and the cause will be remanded for prosecution of the inquiry ordered and further proceedings. The costs of this cause will be paid one-half by the complainant and one-half by the defendants, and the costs below as has been or may be adjudged by the Chancellor.

JOHN J. BROWDER *et als.* *v.* POLLY JACKSON *et als.*

1. WILLS. *Construction.* James Browder was the owner of a tract of land. He died leaving a will in which is the following clause: "After the death of my brother's widow, or any circumstance that will give me the right to said property, I wish the said plantation to be offered to my brother, Jephtha Browder, and my sisters, Jane Eldridge, Nancy Bowman, Juda Russell, Polly Jackson, Eliza Winton, or whichever one of them will take it and pay my executors four thousand five hundred dollars, and in default of any of them being willing to pay this sum for it, then my executors to put it up at public sale to the highest bidder, and of the proceeds of the sale in either case to give my said brother and sisters above named the sum of two hundred dollars, except Nancy Bowman, and to her three hundred dollars." Held, that this was not a devise of the land to the brother and sisters at their election, subject to a charge of $4,500, but that a sale of the land was contemplated. If they accepted the offer they took it as purchasers.

2. CHANCERY PRACTICE AND PLEADINGS. *Necessary parties.* In a bill by the brother and sisters to sell the land, the children of the testator being entitled to the surplus after payment of special legacies, were necessary parties.

FROM MONROE.

Appeal from the Chancery Court at Madisonville. O. P. TEMPLE, Ch.

J. H. GAUT and P. B. MAYFIELD for complainants.

GEORGE BROWN for defendants.

McFARLAND, J., delivered the opinion of the court.

James Browder was the owner of a valuable tract of land in Roane county devised to him by his brother Darius Browder, subject to a life estate in the widow

of said Darius. Said James Browder died about the year 1857, leaving a will and codicil thereto, which were duly proven. The codicil contains the following clause in reference to the tract of land above mentioned, to-wit: "After the death of my brother's widow" (meaning Darius B.'s widow), "or any circumstance that will give me the right to said property, I wish the said plantation to be offered to my brother Jephtha Browder, and my sisters Jane Eldridge, Nancy Bowman, Juda Russell, Polly Jackson, Eliza Winton, or whichever one of them will take it and pay my executors four thousand five hundred dollars, and in default of any of them being willing to pay this sum for it, then my executors to put it up at public sale to the highest bidder, and of the proceeds of the sale in either case to give my said brother and sisters above named the sum of two hundred dollars, except Nancy Bowman, and to her three hundred dollars." "The avails" of the plantation after paying the legacies, he directs to be put into his estate to be divided equally amongst his heirs (meaning his children). In a subsequent part of the codicil the testator shows that he had unintentionally omitted the name of his sister Fanny Edington in the above clause, and directs that she be placed in all respects equal to Jane Eldridge as to the two hundred dollars legacy, and the offer of the plantation. Louisa E. Browder, the widow of said James, and James Eldridge became executrix and executor of the will; the latter soon afterward died, and the former is now sole executrix, she having intermarried with Jonathan Wood. The widow

of Darius Browder, the tenant for life, died on the 20th of May, 1863. Jephtha Browder, the brother of James above mentioned, removed to Texas, and died in the year 1863, leaving a large family, some of whom were minors, and others married women, at the commencement of this litigation. The executrix of James Browder, with her husband, remained in possession of the land, and it does not appear whether they took any steps to carry out the above clause of the will, except perhaps to offer to pay one of the legacies mentioned in confederate money. On the 13th of April, 1866, four of the sisters mentioned in the above clause of James Browder's will, to-wit., Polly Jackson, Juda Russell, Fanny Edington and Jane Eldridge, with the husbands of the first three named, filed their bill in the chancery court at Madisonville, in which the foregoing clause of the will is set out, and it is stated that complainants were informed that Jephtha Browder claimed the whole of said tract of land under said will, and his widow and children are claiming the same; that Eliza Winton and her husband, and Nancy Bowman, have declined to pay any of the price of the land fixed by the will, or accept the benefits thereof. They claim that they, with the others, are entitled to the land as a class, and they all have the privilege of paying their part of the $4,500. They say they are willing to pay this sum and accept the devise, or they claim the right to pay their proportion with the other three, that is, Eliza Winton, Nancy Bowman, and the heirs and devisees of Jephtha Browder, all of whom are made parties.

The executrix of James Browder's will, with her husband, are also made parties by an amended bill. They pray a construction of the will, and that the others mentioned be requird to accept or decline the offer of the land, so that the rights of the complainants shall be ascertained and declared. Winton and wife answered, disclaiming all interest under the will except the legacy of $200. An answer was also filed in behalf of the minor children of Jephtha Browder, deceased, residing in Texas, by a guardian *ad litem,* which, however, contains nothing of importance. On the 6th of December, 1866, *pro confesso* was entered against the other defendants, and a decree rendered which adjudges and declares that all of the parties named in the clause of James Browder's will are entitled to said land as a class, provided they choose to take it and pay said sum of $4,500, and the decree recites that they had all elected to take the land and pay the money except Mrs. Winton, but they claimed that their money legacies under the will should be deducted from the $4,500. The cause was referred to the clerk to report the amount of these legacies, and if anything had been paid to said legatees, and also whether the land was susceptible of partition, or whether it was to the interest of the devisees to sell the same for partition. Wood and wife are then allowed time to answer, but not to effect the adjudication already rendered. They afterward filed their answer, but no notice was taken of it. The master reported the amount of the money legacies to the brother and sisters, and that the land could not be partitioned. On

the 4th of June, 1867, the report was confirmed, the legacies declared a credit upon the $4,500, and the land decreed to be sold. The same decree shows that the court was of opinion that in order to adjust the equities it was necessary to know who had received the rents from the death of Ann D. Browder, the widow of Darius Browder, the life tenant, and if such rents were received by the executrix of James Browder, the same should also be deducted from the $4,500, and the master was again ordered to report. This report was made, showing the rents received by the executrix, and deducting the same as directed. At this point further steps in this cause was suspended until the filing of the present bill, which was filed in the same court by the children and devisees of James Browder or their representatives. They show that they were not made parties to the former cause, and insist that the adjudication does not bind them, and pray that the sale be enjoined, and the decrees referred to be suspended and set aside, and pray that the will be again construed, insisting that the brother and sisters had waived their right to take the land at $4,500. An injunction was granted suspending the sale, but this was modified so as to allow the land to be sold, reserving the rights of the parties to the proceeds, and the land was sold on the 25th of September, 1872, for $8,775. On the final hearing the Chancellor dismissed the bill, the effect of which was to allow the adjudication in the former case to stand. The complainants have appealed. The cause was heard at a former term, and a decision then announced, but

we have again considered it upon a petition to rehear. The first question manifestly is, whether the complainants are precluded by the decrees in the former case, or whether they were proper or necessary parties in order to adjudicate the questions involved. This is a question about which it seems there is some uncertainty. Judge Story says, "The truth is, that the general rule in relation to parties does not seem to be founded on any positive and uniform principle, and therefore it does not admit of being expounded by the application of any universal theorem as a test. It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of courts to suppress multifarious litigation, and partly in the dictate of natural justice that the rights of persons ought not to be effected in any suit without giving them an opportunity to defend them," and therefore he proceeds to show that the general rule upon the subject is subject to many exceptions. Sto. Eq. Pl., sec. 76c, 8th Ed. But he states the general rule in equity to be "that all persons materially interested, either legally or beneficially, in the subject matter of the suit," or as it is sometimes expressed, "in the object of the suit," are to be made parties either as plaintiffs or defendants, however numerous they may be, so that there may be a complete decree that shall bind them all. See secs. 72, 76a. Where a legatee brings a bill against an executor, other legatees not parties are not bound by the account, the party interested in the surplus is especially necessary. Sec. 73. In a bill to carry into effect the trusts of

a will, the devisee is ordinarily a necessary party. Secs. 180, 181.

It is unnecessary to discuss the exceptions, for they throw no special light upon the question in this case. The object of the bill in the case under consideration was a construction of the will of James Browder by which it was claimed that his brothers and sisters were devisees of a valuable tract of land, upon the condition they elected to pay a given sum, and to have the land decreed to them, and to have an account of legacies claimed to be due them under the will. The decree went still further, and ordered an account of the rents and a sale of the land, neither of which were prayed for in the bill. The children of James Browder (the present complainants) were certainly beneficially interested in the result, they are the residuary legatees. In the event the brother and sisters were not entitled to the land it was to be sold, and the surplus of the proceeds to go to the residuary legatees, and as the land was sold for nearly twice the sum of $4,500, they are unquestionably affected by the result to the extent of the difference between the two sums, as well as the rents. On this question they were not represented by the executrix, as she had no direct interest in the question. In fact, the parties directly interested in the subject matter or object of the suit, directly and most materially affected by the adjudication, were the complainants in the cause on the one side, and the present complainants on the other, and no one else had any direct interest in it, and it would seem the present complainants of all

others should have been parties. The executor, it is true, represents all parties as to the personal estate, and if it were conceded that the executor had an absolute power of sale of the land, and had exercised it, those interested in the proceeds would no doubt be bound by his acts, and so where he is trustee. At all events, I am of opinion that if the present complainants were not necessary parties (as I think they were) they were at least proper parties, and having come in before the property was finally disposed of, I think they ought to be heard, and the previous decrees are not conclusive upon them.

The question then recurs as to the proper construction of the will in question. The theory of the complainants in the first cause, which was adopted by the decree of the Chancellor, is, in substance, that the land was devised to the brother and sisters if they elected to take it and agreed to pay $4,500, and the filing of the bill by four of them expressing their willingness to pay said sum was an election which vested the title in them by the terms of the will, the title relating to the death of the testator, and entitling them to rents from the death of the tenant for life. Thereupon they were entitled to have the land sold as their property for partition, the entire proceeds, of course, to go to them. The executor, for the benefit of the estate, to be paid $4,500 and interest (it is to be inferred out of the proceeds of the sale, it not being otherwise provided for). From the $4,500 is to be deducted the legacies to the brother and sisters, and the rents. The result was, the brother

and sisters would receive the entire proceeds of the sale (less about $3,500), being over $5,000, whereas the will directs they be paid out of the proceeds, legacies amounting to $1,300. I am of opinion that the will was not intended as a devise of the land to the brother and sisters at their election, subject to a charge of $4,500, but that it contemplated a sale of the land. The executor was to offer it to the brother and sisters, that is to offer to sell it to them, or to whichever one of them would take it and pay that sum for it, or in default of any of them being willing to pay that sum for it, it was to be sold at public sale. If they accepted the offer, they took it as purchasers, and their title would date from the contract or conveyance to them by the executor. The ordinary words used to pass title to lands by will, such as "devise," "give," etc., are not used; while this is not conclusive it is worthy of consideration in connection with the entire clause and the general purpose. That the testator did not intend to give the land or any part of it to his brother and sisters, is evidenced by the fact that in either event, that is whether they take it at $4,500, or the land be sold at public sale, they are each to be paid out of the proceeds two hundred dollars, except one sister, who is to have three hundred dollars, and no more. This shows that he intended to give all beyond these sums to his children, who were the principal objects of his bounty. The testator intended that the executor should offer to sell the land to his brother and sisters, and he himself fixes the price, which he probably supposed was

the fair value of the land; and it may be conceded that this gave them the right to insist upon the purchase at the price stated, even though the land was of greater value. Still, to give them this right they were required to purchase it. One object probably was to give them a chance to retain the property in the family. It was not intended, in the event the land had to be sold to others, that his brother and sisters should have the benefit of all the land might bring over the sum of $4,500, for the will expressly says that in either event they are to have only the legacies mentioned.

Assuming, then, that the will contemplated a sale by the executor, or an offer to sell, it may be argued that as the will directs the executor "to offer it" to his brother and sisters, that the executor was in default for not having done so, that he was required to take the initiative; that the failure to make the offer authorized the brother and sisters to come into the chancery court as they did to enforce their right. Conceding it to have been the duty of the executor to have taken the initiative and made the offer, still as it was to be simply a purchase of the land at a given price, the brother and sisters had nothing to do but to demand their right to purchase at the price. They were fully informed as to their rights. The will was proven and of record, and in the bill filed by them they do not complain that they were ignorant of their rights, nor do they complain because the land was not offered to them. They put their claim upon the ground that the land was de-

vised to them. But conceding that they had the right to come into the chancery court to enforce their claim, still, when they came into court they did not propose to purchase the land; they say they were willing to pay the $4,500, but they brought no money into the court, nor did in any manner secure the sum or propose to do so. Three of them were married women. The decree declares the right in favor of the complainants as well as another sister and the children and heirs of Jephtha Browder, who were infants and married women. If the land had sold for a less sum than §4,500, there is nothing to show that the remainder of the price would have been secured, and some of the parties at least would not have been bound to pay it, so that the complainants in that case had nothing to risk without paying or in any way securing the $4,500. They prayed for and obtained a sale of the land; if it sold for a greater sum they had the benefit of the sale; if for a less sum, they had paid nothing, and could well afford to risk the result. True, if the will be considered as a devise of the land to them absolutely, subject to a charge of $4,500, then it was proper to sell the land to pay the sum, and they were entitled to the proceeds of the sale. But I think this is not the proper construction. The brother and sisters not having demanded and enforced their right to purchase at the given price, and the land having been sold to other parties, they are entitled only to their legacies. This I think the fair spirit and meaning of the will, and I think the decree should be accordingly, and the

court concurring it is so ordered. The costs, however, will be paid out of the proceeds of the sale of the land.

3L 162
7L 688
15L 180

STATE v. R. H., T. L. & CALHOUN SWAFFORD.

CRIMINAL LAW. *Robbery. Indictment.* An indictment for robbery under the Code is good, which charges the offense in the words of the statute defining the offense.

FROM BLEDSOE.

Appeal in error from the Circuit Court of Bledsoe county. D. C. TREWITT, J.

ATTORNEY-GENERAL LEA for the State.

J. T. R. SWAFFORD and D. L. SNODGRASS for Swaffords.

COOPER, J., delivered the opinion of the court.

The indictment in this case, charging the defendants with robbery, was quashed in the court below, and the State appealed.

The indictment is, that the defendants, on a day named, "did unlawfully, feloniously, forcibly, and vio-

lently take from the person of Rosco Bennett a pistol of the value of three dollars, the property of the said Rosco Bennett, by using force and violence."

By the Code, section 4631: "Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence, or putting the person in fear."

The Code, section 5119, is: "All indictments for offenses designated by law, which are offenses at the common law, are good, if the offense is charged or described according to the common law."

Section 5120 says: "On the other hand, in all cases where the common law prescribes particular and technical language to describe an offense punished by this Code, it is sufficient to describe the offense according to the general rules laid down in this chapter."

The leading rule thus referred to, is contained in section 5114. "The statement of the facts constituting the offense, in an indictment, shall be in ordinary and concise language, without prolixity or repetition."

The indictment before us uses all the language of the Code defining the offense of robbery. It expressly avers a felonious and forcible taking from the person of another of a chattel of value by violence. It does not follow the usual common law form, which avers an assault, and a taking against the will. But a felonious and forcible taking by violence from the person, can only be done by an assault, and against the will. And to say that the defendants did make an assault, would not make the act charged plainer, nor would it be any more an averment of a fact, than that they

did feloniously and forcibly take from the person. It has never been necessary to state the circumstances which constitute the assault or the forcible taking from the person by violence. The essential ingredients of the offense are, the "felonious and forcible taking from the person of another, goods of value by violence," and the facts which constitute the offense as mentioned in the statute, and in the words of the statute, with some superfluous additions, are charged. No decision made since the adoption of the Code has required more.

The judgment must be reversed, and the cause remanded for further proceedings.

THE STATE v. A. & C. POWELL.

1. CRIMINAL LAW. *Indictment. Selling liquor near an election ground.* An indictment against A. & B., partners, trading under the name of A. & B., will be treated as against the parties individually.

2. SAME. *Same. Same.* An indictment which alleges that the defendants "did unlawfully keep open their liquor shop within one half mile of an election ground," is sufficient, and it is a matter of fact for the jury whether the place was near an election ground.

State *v.* Powell.

8. SAME. *Same. Same.* It is sufficient to charge that it was on election day, without stating that an election was actually opened and held. If no election was held, this would be a matter of defense.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. TREWHITT, J.

ATTORNEY-GENERAL LEA for the State.

LEWIS SHEPHERD for Powell.

FREEMAN, J., delivered the opinion of the court.

This indictment is against A. and C. Powell, partners trading under the name of A. & C. Powell, charging that "between the hours of sunrise and sunset, on 21st day of November, 1878, in the county of Hamilton, they did unlawfully keep open their liquor shop, which is situated within one-half of a mile of the election ground of the 5th ward of the city of Chattanooga; the said 21st day of November being an election day for the purpose of electing a mayor and aldermen for said city of Chattanooga."

The indictment was quashed, on motion, by the court below, and appealed by the State.

The section of the Code, 4912, act of 1869–70, creates the offense in this language: "No liquor shop in this State shall be kept open on election days, nor shall any person, on said days, give or sell intoxicating liquors to any person for any purpose, at or near an election ground." This was, by act of 1877, extended, and made applicable to all elections held under

authority of municipal corporations; and any person who may, in any such election, violate the above section, is subjected to indictment or presentment, etc. Several objections are taken to this indictment. First, that it is against a firm. We think there is nothing in this—the indictment is to be so treated as against the parties individually—the fact of their being partners, and so stated, does not alter the nature of the charge. It is an act done in the course and usual conduct of their business, and on a day forbidden by law.

The charge is substantially, that these parties kept open their liquor shop, situated within one-half a mile of the election ground of the 5th ward of the city of Chattanooga, on 21st day of November, being the day for the election of mayor and aldermen of the city. The charge might have been more specific, as to an election being actually held, but the fair meaning is, that it was on a day of election, and the law would presume the authorities did not fail of their duty to open and hold an election as required. If none was held in fact, then it is matter of defense that can easily be shown.

While we think, when the offense is charged to be, keeping open a liquor shop on the day of a municipal election, it must be shown to have been done at or near to the said municipality, still we do not think the objection well taken, that as a matter of law, half a mile from a voting place would be too far to incur the penalties of the statute. The object was to prevent parties on election days being debauched

by liquor, or having access to liquor shops, kept open to furnish supplies of drink, when the people assembled on such occasions. The fruitful source of breaches of the peace and violations of law, on the day of elections, was intended to be prevented. If the shop is kept open at such convenient distance as to be readily accessible to the persons attending the election, the evils intended to be guarded against would follow its being kept open on that day. Whether this be so or not, will be matter for a jury to decide, under proper instructions from the court; but we cannot say how that is, on the face of the indictment. Within half a mile of the voting place, may be within the mischief or may not. It is a question of fact, not of law, under this statute. The charge is as easy to be met in this form, as if it had been at or near the voting place, and this certainly would have been good in view of the objects of the statute.

Such is the principle of the case of *Manis* v. *The State*, 3 Heis., 315, where the indictment was for selling or giving liquor on an election day. The place in that case was a mile and a quarter from the voting place. For these reasons we hold the indictment is good, and reverse the judgment of the court, and remand for further proceedings.

THE STATE *v.* ART. ESTES.

GRAND JURY. *Inquisitorial powers. Selling liquor to students.* The Grand Jury have inquisitorial powers in cases of selling liquors to students, of any educational institution, without consent of parent or guardian.

FROM MARION.

Appeal in error from the Circuit Court of Marion county. D. C. TREWHITT, J.

ATTORNEY-GENERAL LEA for the State.

SPEARS & SPEARS for Estes.

DEADERICK, C. J., delivered the opinion of the court.

Defendant was presented under section 4862 of the Code, for selling, giving and delivering to W. K. Smith, a student of Houston Academy, vinous and spirituous liquors.

The defendant pleaded in abatement, that the presentment was not founded upon the knowledge of any member of the grand jury, but upon the testimony of a witness sent for and examined by them.

The court, upon the State's refusal to take issue upon the plea, and refusing to overrule the plea, upon motion gave judgment, quashing the presentment and discharging defendant, from which the State appealed.

The question presented is, has the grand jury inquisitorial powers in such a case?

Section 4862 makes it a misdemeanor to sell, give or deliver to a student of any educational institution, any vinous or spirituous liquors, without the consent of his parent, guardian, or person having the care of him.

Section 4863 makes it a misdemeanor to sell or give or deliver liquors to a minor, etc.; and section 4864 makes it a misdemeanor to sell any dangerous weapon to a minor, etc.

Section 5087*a* provides that the grand jury may send for and examine witnesses in all cases where they suspect a violation of the law against carrying arms, or lewdness, or on the selling, giving, or delivering of liquors or weapons, to minors, as provided under sections 4862, 4863 and 4864 of the Code of Tennessee.

This section may be literally interpreted as authorizing the grand jury to send for witnesses only in cases of selling, etc., to minors, but in order to give it that restricted construction, so far as it relates to section 4862, would require that we should declare its reference to the provisions of said last named section unmeaning. Whereas the obvious purpose of section 4862, which seems to assume that students, etc., are minors under the care of others, was to protect from demoralization the youth at educational institutions who might or might not, for the time being, be under the immediate care of parent or guardian.

And to render this protection more effectual, it is manifest that section 5087*a* intended to give grand juries inquisitorial powers in regard to all the offenses named in sections 4862, 4863 and 4864, for these sections are named as describing the offenses in which the grand jury shall have such power.

And although the act is somewhat ambiguous, we are of opinion that the Legislature, by section 5087*a*, intended and meant to confer on grand juries the power to send for and examine witnesses in the cases of sale, etc., to students under section 4862, as fully as they intended to confer this power in cases arising under the next succeeding section, where the prohibition is against the sale, etc., to a minor, whether he be a student or not.

The judgment of the Circuit Court is, therefore, erroneous and must be reversed, and the cause remanded for a trial upon its merits.

W. H. TURLEY *v.* N. G. TAYLOR *et als.*

CHANCERY PRACTICE AND PLEADING. *Creditor's Bill. Return of nulla bona.* The defense that in order to sustain a judgment-creditor's bill, under the Code, section 4282, *et seq.*, it is necessary to show the return of an execution on the judgment unsatisfied in whole or in part, if it be a defense at all, is to the jurisdiction and waived by answer.

FROM CARTER.

Appeal from the Chancery Court at Elizabethton. H. C. SMITH, Ch.

H. M. FOLSOM for complainant.

C. J. ST. JOHN for defendants.

COOPER, J., delivered the opinion of the court.

On the 9th of November, 1875, this bill was filed by complainant, as a judgment-creditor of defendant Taylor, to subject to the satisfaction of the judgment, a claim of several thousand dollars in favor of Taylor, allowed against an estate, in an administration suit, by the decree of the Chancery Court, affirmed by this court. The bill alleges that a part of complainant's judgment has been paid, leaving the sum of $5,150.56 due and unpaid. That Taylor has no property, real or personal, subject to an execution at law, "as is fully shown by the return of the sheriff on an execution from the Circuit Court in favor of A. L. Maxwell against N. G. Taylor." The bill prayed and obtained an injunction, inhibiting the defendant from

selling, transferring, or assigning the claim sought to be reached. Taylor answered the bill, admitting the complainant's judgment and the amount due thereon as charged, and admitting also the recovery in his favor sought to be subjected. He denies that he is without property, real or personal, subject to execution, and says that when the sheriff came to him with the Maxwell execution, he informed him that he had no personal property, but had lands which he could levy upon, and gave him a description of them. That he knows nothing of the officer's return, but insists that it is not conclusive, and only *prima facie* evidence of the fact returned. And he claims the right to show that the return is untrue. The only evidence introduced was the return of the sheriff of Carter county on the Maxwell execution, made on the 27th September, 1875, thus: "Search made, and no property of the defendant to be found in my county upon which to levy this *fi. fa.*" On the final hearing, the Chancellor dismissed the bill, and the complainant appealed.

The complainant's judgment was rendered by this court in Knox county, and the bill is filed in Carter county, where the principal defendants reside. The act of 1832, brought into the Code, section 4282, *et seq.*, gives the Chancery Courts exclusive jurisdiction to aid a judgment-creditor to subject to the satisfaction of his judgment, "the property of the defendant which cannot be reached by execution." It expressly authorizes the judgment-creditor, "whose execution has been returned unsatisfied in whole or in part," to file a bill and acquire a lien. It has been held that the juris-

diction is not in aid of an execution, and therefore a return of *nulla bona* in the county in which the judgment was rendered, will sustain a bill in any other county. *Embree* v. *Reeve*, 6 Hum., 37; *Riddle* v. *Motley*, 1 Lea, 468. It is almost certain that a similar return to an execution issued to the county in which the bill is filed, would be equally efficacious. *Stark* v. *Cheatham*, 2 Tenn. Ch., 300. The return has in fact been treated as a form, only material because it is made by the statute sufficient evidence to sustain a bill. *Esselman* v. *Wells*, 8 Hum., 482, 487. It has never been held to be the only evidence of the fact shown by the return. Be this as it may, the defense that there is no such return is to the jurisdiction, and must be made by motion to dismiss, demurrer, or plea in abatement. Code, sections 4309, 4321. The defendant makes no such point, and only puts in issue, by the answer, the fact of which he concedes that the return on the Maxwell execution is *prima facie* evidence. This admission throws the burden of proof on him, and he has made none. Besides, he does not say that he owns any realty in Knox county, and the issuance and return of an execution to that county would be a mere form.

Reverse the decree, with costs, and render the proper decree here.

3L 174
9L 647
4pi 52

SAMUEL J. LEWIS *v.* JOHN W. WATKINS.

CONTESTED ELECTION. *Sheriff. Costs.* A defeated candidate for sheriff, who at the first Circuit Court after the election contests the election of the successful candidate, under the Code, section 889, may rely upon matter which simply goes to the disqualification of the defendant, with matter which tends to establish his own election; but if he fail in establishing his own right to the office he must pay, as the unsuccessful party, the costs of that branch of the contest, while entitled to recover costs on the other branch if decided against the defendant.

FROM JAMES.

Appeal in error from the Circuit Court of James county. D. C. TREWHITT, J.

DEWITT & SHEPHERD for Lewis.

VANDYKE, COOK & VANDYKE for Watkins.

COOPER, J., delivered the opinion of the Court.

At the election held in James county on the 1st of August, 1878, Lewis and Watkins were the contesting candidates for sheriff, and Lewis received the certificate of election on a majority of five votes. On the 5th of the same month, Watkins gave Lewis notice in writing, that at the next term of the Circuit Court, commencing in September, he would contest his election on certain grounds mentioned, being grounds upon which Watkins claimed that he was the successful candidate. At the September term, both parties

having appeared, Watkins obtained leave to add to the grounds of his motion, and, among other grounds, that the defendant was ineligible because a defaulter. At the ensuing January term, Watkins filed his declaration containing two counts, one of these counts being based upon those grounds upon which he relied to establish his own election, the other was based solely on the ineligibility of the defendant because a defaulter to the State on the day of the election, for public revenue collected by him as tax collector in 1875. The defendant filed a demurrer to the declaration, assigning various causes of demurrer. The Circuit Judge sustained those causes of demurrer which went to the insufficiency of the allegations of both counts. He overruled the other causes of demurrer, among which one went to the incongruity of the grounds of the two counts, and another put in issue the point whether the contestant could contest the right of the defendant to the office, after he had been inducted into office, of which fact the court would judicially take notice, upon a ground which, while it might show the defendant ineligible, would not establish the contestant's right to the office.

The plaintiff amended his declaration so as to state the facts with sufficient particularity; one count, as before, being based upon grounds which, if true, would show that the contestant, except for the intimidation exercised on the voters at one precinct whereby six votes were lost to him, and the opening of the polls at another precinct after they had been closed according to law, whereby at least five votes had been ille-

gally cast for defendant, was the successful candidate; the other count, as before, went exclusively upon the ground that the defendant, as the collector of public revenue, was a defaulter on the day of election. The defendant pleaded not guilty, and two special pleas in substance that before his induction into the office of sheriff, the defendant, if he was a defaulter on the day of the election, had settled up his defalcation. The Circuit Judge sustained a demurrer to the special pleas. The case was tried by the Judge without a jury, who found the issue on the first count in favor of the defendant, and the issue on the second count against him. It was thereupon adjudged that the election of the defendant was void, and it was ordered that the judgment be certified to the County Court. The court, after overruling motions by the defendant to tax the plaintiff with the attendance of all witnesses summoned by him to testify in relation to the matters of the first count, and, at any rate not to tax defendant with the attendance of witnesses not sworn and examined, or witnesses in attendance before the pleadings were made up, adjudged that the plaintiff recover of the defendant all the costs of the cause. The defendant has appealed in error.

There is no ground for disturbing the findings of the Circuit Court on the facts, and the errors relied on for reversal go back to the rulings of his Honor on the demurrer to the declaration, and the demurrer to the pleas. There is a further assignment of error, in the event the judgment should be in other respects affirmed, on the matter of costs.

The substance of the cause of demurrer assigned to the declaration is, that the matters relied on in the second count are not the proper subject of contest by the plaintiff, the defendant having been inducted into office. If, in point of law, the plaintiff could not make a contest upon this ground, the two counts of the declaration were incongruous and the second count should have been held bad.

Title 6 of Part 1 of the Code, section 748, *et seq.*, treats of Officers and Elections. Chapter 3, under this title, commencing with section 888, treats of contested elections, and article 1 of that chapter, of the jurisdiction of contested elections. By section 889, it is provided: "The Circuit Court hears and determines all contests of the election of sheriff." Article 4 of the same chapter, treats of the "Judgment on contested election cases, and the effect thereof." By section 907, the first section of this article, it is provided: "After hearing the allegations and proof, the Court shall give judgment either confirming or annulling such election altogether, or declaring some other person than the one whose election is contested, duly elected." By section 912, the last of this article, it is provided: "When the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of constitutional disqualifications on his part, or for other causes, the person receiving the next highest number of votes cannot be declared elected, but the election shall be declared void, and so certified to the power authorized to fill the vacancy, or order a new election."

In *Marshall* v. *Kerns*, 2 Swan, 68, the successful candidate in an election for clerk of the Circuit Court of Campbell county, produced his certificate of election, with proper official bonds and sureties, and moved the court to induct him into office. The old clerk, who was his competitor, asked leave to resist the motion, and was permitted to do so. On the trial, it was proved that the election was not held in one of the civil districts of the county by the neglect of the officer appointed to hold the election at that place. The majority in favor of the successful candidate consisted of three votes, while the voters of the district in which no election was held consisted of a larger number. It did not appear that a majority of these voters, or in fact any number would have voted for the contestant. The court held the election void, because the polls were not opened in the district in question. The correctness of the ruling has been, and may well be doubted. *L. & N. R. R. Co.* v. *Davidson County*, 1 Sneed, 693. But the court, upon the basis of the correctness of the decision, which was under the act of 1846, ch. 19, brought into the Code in section 889, says: "We see no reason why the present incumbent, or other citizen of the county interested as a citizen in the appointment, might not be permitted to offer legal opposition to a false and void election. And such fact appearing to the judge, he should deem it his duty to refuse to qualify and induct the pretender to the office."

In *Boring* v. *Griffith*, 1 Heis., 456, which was a contest over the office of sheriff, the proceedings were

commenced, as in this case, by notice at the first term of the Circuit Court after the election. The Circuit Judge sustained a demurrer to the petition, and this court reversed the judgment. The main argument to procure and sustain the judge's ruling was, that at the time, the jurisdiction to try the cause had been transferred to the Criminal Court, the statute having enacted that said Criminal Court shall have "exclusive jurisdiction of all causes in which the State is a party, or which, by the laws now in force, require the services of an attorney-general." To this argument, Judge McFarland, who delivers the opinion of the court, replies: "This contest is not, in any sense, a criminal proceeding, but a contest between two private individuals as to the right to exercise the functions and enjoy the emoluments of the office. This right which the party claims to hold in the office, is defined to be an incorporeal right, and the party is attempting to enforce his right by a civil proceeding." It is added, that such contests are tried without the State being in any manner represented. Nor does it fall within the class of cases provided for by the Code, section 3409, *et seq.*, where a party unlawfully usurps an office, for section 3423 provides, "that the validity of any election which may be contested under this Code, cannot be tried under this chapter." Treating the contest of particular elections under the Code, section 888, *et seq.*, as a contest between individuals, for an incorporeal right, the provisions of the Code, section 3409, *et seq.*, do dot apply. But proceedings might be instituted under these latter sections, in the name of the State, to oust

an incumbent whose election was void because of his disqualification for office at the time of his election or induction.

In *Blackburn* v. *Vick*, 2 Heis., 377, the contest was over the office of revenue collector, which was commenced before, and continued after the induction of the successful incumbent into office.

The Constitution of 1870, art. 2, sec. 25, says: "No person who may be a collector or holder of public moneys, shall hold any office under the State government until such person shall have accounted for and paid into the treasury all sums for which he may be accountable or liable." And by the Code, section 748, sub-sec. 4, those who are defaulters at the time of the election are ineligible, "and the election of any such person shall be void." In *Newman* v. *Justices*, 6 Hum., 41, the provision of the Code, which was taken from the act of 1844, ch. 196, sec. 2, was considered. There, Newman was elected sheriff of Jefferson county, and, as such, collected State and county taxes, which he failed to pay over. Having been re-elected sheriff, he was inducted into office by the County Court. But at a subsequent term of the same court during the year, upon the production of the record of a judgment against him, showing him to have been a defaulter at the time of the election, the County Court declared the office vacant, and proceeded to elect a sheriff *pro tem.* This action of the County Court was sustained upon appeal, first by the Circuit Court, and then by this court. After quoting the language of the statute, which, like the Code, declares

that no person who is a defaulter shall be eligible to office, "and the election of any such person to office shall be void," the court said: "An act which is void is as if it had never been done, and Newman was no more the sheriff of Jefferson county for the year 1844, than if he had not been elected to discharge the duties of that office."

In *Pucket* v. *Bean*, 11 Heis., 600, Bean, having received a certificate of election to the office of sheriff, applied to the County Judge to induct him into office, which he refused to do upon the ground that the applicant was a defaulter. Upon petition by Bean for a writ of *mandamus* to compel the County Court to induct him, the County Judge replied that Bean had been tax collector, and as such was a defaulter to the State, county, and public schools. Upon the trial, the petitioner was shown to be a defaulter, and thereupon his petition was dismissed, and, upon appeal to this court the judgment was affirmed. The court held, Judge Turney delivering the opinion, that the question raised by the answer might be tried as a fact without any judgment of previous conviction for the default, and the election of a defaulter was void.

It will be seen from the review of the authorities, that the right of the contestant, whether one of the candidates or an independent citizen, or, as in the last case, a public officer, to show that the defendant having a certificate of election is a defaulter, and, as such, that the election is void, and may be so adjudged, is conceded wherever the contest has been over the induction of the defendant into office. This case was

commenced before the defendant's induction into office by the notice, but no effort seems to have been made to stay the induction. The question is, therefore, an open one, whether in such a case, after induction, the contestant may rely upon matter which goes only to the disqualification of the incumbent, in connection with matter which bears exclusively upon the merits of his own claim to the office. And no reason occurs why he may not. For, if the election be void, the contestant, like any other citizen, might offer legal opposition to a void election, at any rate where the contest is prompt, and before the induction of the defendant into the office. The provisions of the Code seem to contemplate this as one of the grounds of contest, and provides for the judgment in precisely such a case where the finding is in favor of the defendant on the question of election, but against him on the point of his legal or constitutional disqualification. In this view the rulings of the court upon the demurrers to the declaration and the pleas were correct. The point of time to test the eligibility of a candidate is the day of the election, under the statute. The Constitution is differently worded, and might admit of less rigid legislation.

But it is very clear that the cause of action which rests upon the plaintiff's title to office, is altogether different from the cause of action which rests solely on the disqualification of the defendant. If the contestant choose to unite them in the same suit, he must take the consequence which follows at law the uniting in one declaration of several independent causes of ac-

tion, on some of which he succeeds, and on others fails. He is the successful party only in those counts on which he succeeds, and the losing party in those counts on which he fails. *Allison* v. *Thompson*, 2 Swan, 202; *Boothe* v. *Cowan*, 5 Sneed, 357. The judgment below must be reversed as to the costs. The plaintiff below will be charged with the costs which have accrued under the first count, and the defendant below with the costs of the suit under the second count.

The judgment of the Circuit Judge will be affirmed so far as it adjudges that the plaintiff in error was ineligible to the office of sheriff by reason of his being a defaulter to the public treasury as tax collector on the day of the election, and the judgment will be certified to the County Court. But the judgment as to the costs will be reversed, and judgment entered here against Watkins for the costs of the court below arising under the first count of his declaration, and against Lewis for the residue of the costs below, and for the costs of this court.

R. H. MYERS *v.* F. J. BENNETT.

1. CHANCERY PRACTICE. *Taking Accounts.* By the settled rule of Chancery practice, the parties are required to furnish the clerk with their respective accounts of the matters of reference, from which he can see the points of difference, and limit the evidence to those points.

2. SAME. *Partnership. Balance Sheet.* Where a partnership account is ordered, each partner is an actor, and, unless all the partners join in employing a competent accountant to make out a balance sheet of the business with proper schedules, should be required to furnish his own statement of the account.

3. SAME. *Partnership Books. Should be examined by experts.* Partnership books, to which each partner has had access, are *prima facie* evidence as between the partners, but the partners cannot, in lieu of the statement required, put in their general books of accounts, consisting often of immense folios, which neither the clerk nor the court can be required to examine. It is the duty of the parties to have them examined by experts, to ascertain what they do show, and to extract from them, in the form of balance sheets and schedules, such general statements, and such specific facts as may tend to elucidate contested matters of charge and discharge.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

VANDYKE, COOKE & VANDYKE for complainant.

KEY & RICHMOND for defendant.

COOPER, J., delivered the opinion of the court.

On the 1st of April, 1868, the defendant, Bennett, having bought from complainant, Myers, a half interest

in certain mill property in Chattanooga, the two entered into articles of partnership in writing, to run the mills. By the terms of the agreement, Bennett was to manage the business at the mill, with the aid of a clerk to be furnished by Myers, whose services were to balance those of Bennett. It was agreed that "if Myers furnished the capital," he was to be allowed a reasonable per cent for the amount he has to pay for said capital. The business was commenced, and continued until about October of the next year, when it was brought to a close by mutual consent, because found not to be profitable. The only capital put in seems to have been in the shape of corn and wheat to run the mill, furnished by Myers, for a consideration. Regular books were kept of the business, open to the inspection of both partners. On the 28th of April, 1870, Bennett sold and re-conveyed to Myers his half interest in the mill property for $3,800, "a portion of which," says the deed, "is paid in hand, and a portion unpaid, the respective amounts paid and unpaid being unascertained, and dependent upon a settlement of the partnership of Myers & Bennett, which settlement is to be made at an early day, and the balance found to be unpaid at such settlement to be due and payable twelve months from this date, and is to be a lien on the land and lots herein conveyed." The meaning of this peculiar language may be fairly implied to be, that the parties knew, at the time, that the partnership had been a losing concern, and that Bennett was justly indebted to Myers, by whom alone any capital had been advanced, for his part of the

loss, which indebtedness he was willing to treat as a payment on the land. Neither party supposed at that time that the loss to Bennett would cover the whole purchase money, and, therefore, the stipulation for the payment of the balance in a given time, and the retention of a lien for its payment. We learn from the clerk of the partners, incidentally, that he estimated the loss about the middle of 1869 at $2,200.

The parties agreed to refer the settlement of their mutual claims to the award of arbitrators. The original bill in this cause was filed by Myers to set aside the award made under this agreement, and for a general settlement. Bennett insisted on the award, and filed a cross-bill to enforce his vendor's lien for the purchase money of the land. Such proceedings were had that, by a decree of this court, the award was set aside, and a general partnership account and other accounts ordered, and the cause was remanded to take the accounts. At the January term, 1875, of the Chancery Court, the necessary reference was made. The report was presented to the October term, 1877, to which exceptions were taken by both parties, and a final decree rendered on the 20th of April, 1878. The result of the report, and of the Chancellor's rulings on the exceptions, was to leave a balance in favor of Bennett, as of that date, of $1,129.99, for which the Chancellor gave him a decree, and ordered the land to be sold in satisfaction thereof. Myers alone appealed.

This case illustrates the loose practice of our Chancery Courts in taking a partnership account. The

partnership in this case was of the simplest character, continued in existence only about eighteen months, and kept regular books. A competent book-keeper in a week of continuous labor, or in a month's time spending only a few hours each day at the work, could have easily made out a balance sheet, with proper schedules, showing the exact status of the firm business, and upon which the master in a couple of hours could have drawn up a technically correct report. Instead of taking this sensible course, without the examination of a single expert to show the substance of the business, the partnership books are handed over to the master, and the learned counsel for both parties, not only thus practically, but by taking exceptions based upon what is shown by the books, and by obtaining an order to have the books sent up to this court, have apparently thought that the partnership books were a part of the record, and could be looked to by the court. The clerk, under these circumstances, having only these books without any assistance from the parties, may well be excused in reporting, as he did from term to term for nearly three years, that the report had not been completed for want of time.

By the settled rule of chancery practice, the parties are required to present the clerk with their respective accounts of the matters of reference, either before or after they have examined their adversary on interrogatories. 2 Dan. Ch. Pr., 1221. It is by a comparison of these statements, that the clerk is enabled to see the points of real difference, and to require evidence

from the parties touching those points. In far the largest number of items in an account between parties, and especially in partnership accounts, there is no controversy. But the master is at sea in reference to the real points of difficulty unless he is furnished with these statements. Where a partnership account is ordered, each partner is an actor, and may furnish his own statement. The sensible rule is for them to unite in employing a competent accountant to make out a balance sheet of the business, with proper schedules, and to be ready to testify as to the exact showing of the books upon any disputed point. If they cannot agree, each should be required to furnish his own statement. The partnership books, to which each partner has had access, are *prima facie* evidence as between them. *Taylor* v. *Boyd*, 6 Heis., 613. But the parties cannot, in lieu of their respective statements, put in their general books of account. *Reed* v. *Jones*, 8 Wis., 421. These books usually consist of immense folios, which neither the clerk (*Turner* v. *Hughes*, 1 Busb. Eq., 116), nor the court can be required to grope through. *Norwood* v. *Norwood*, 2 Bland, 481 in note; *Budeke* v. *Ratterman*, 2 Tenn. Ch., 459; *Poor* v. *Robinson*, 13 Bush, 290. It is the duty of the parties to have them examined by experts, to ascertain exactly what they do show, and to extract from them, in the form of balance sheets, exhibits and schedules, such general statements and such specific items and facts as may be in dispute, or tend to elucidate contested matters of charge or discharge. Without the light thus afforded, the books themselves

would rather tend to mislead than to enlighten, and the record would be uselessly encumbered to no purpose.

If parties do not choose to adopt this mode of accurately ascertaining their rights, they must take the consequences. It is impossible to act on scientific principles at the end of a long lawsuit, if the parties have themselves ignored all the rules of science. It is to the interest of the Republic that there should be an end of litigation. It is still more to the interest of the parties, even at the risk of some doubt in relation to the scientific accuracy of results.

The method of taking a partnership account is: 1. To ascertain how the firm stands in relation to third parties. 2. To ascertain what each partner is entitled to charge in account with his co-partners. 3. To apportion between the partners all profits to be divided, or losses to be made good, and ascertain what, if anything, each partner must pay to the others, in order that all cross-claims may be settled. 2 Dan. Ch. Pr., 1249.

The substance of these rules is, that the profit or loss of the business must be first ascertained, and then how this profit or loss is to be shared by the respective partners. *Hicks* v. *Chadwell*, 1 Tenn. Ch., 251. The master, in this case, has evidently aimed to attain these results. The defendant has not appealed, and his exceptions to the report cannot be noticed, under the settled rule of this court, that in this class of cases, an appeal by one party brings up the case only as to his exceptions.

The first and main ground of error relied upon

by the appellant Myers is, that he is charged with the entire products of the mill, thus onerating him with the labor and duty of surcharging and falsifying. The clerk does seem to have made his statement in that form, when it ought to have been an account of Myers & Bennett, with profit and loss. But upon careful examination the account is in reality of the profit and loss. If it had purported to charge Bennett with the assets, the result would have been precisely the same. It is based upon the books, and in no event could either partner have changed the result except by the introduction of competent proof to remove the *prima facie* case.

The next objection is, that the Chancellor erred in charging Myers with one half the loss of the capital stock, the clerk having already charged him with the whole of it. But, as we have seen, the latter charge was a mere form. The account really ascertains the profit and loss. There was a loss greater than the capital stock, and each must bear his equal share of the loss. For the same reason, the third assignment relied on is untenable. The debt mentioned was only included in the general account to ascertain the profit and loss, and one credit was all the complainant was entitled to. The last assignment, based on the 12th exception, is not available, because no such claim was made or entered on the books during the existence of the partnership, nor any contract on which to base it. Other exceptions not argued are clearly untenable.

The decree will be affirmed, and the appellant will pay the costs of this court.

3L 191
5L 110
5L 182
6L 63
1pi 294

A. W. ARMSTRONG, Adm'r, and SARAH E. DUNLAP *v.* SAMUEL CROFT *et als.*

1. CHANCERY PRACTICE. *Fraudulent transfer of property. Administration.* A creditor of a deceased debtor may file a bill against a fraudulent grantee of the latter to reach the property conveyed, without first obtaining a judgment on his debt or proceeding against the property of the estate.

2. SAME. *Statute of two years and six months.* To such a bill, a plea by the fraudulent grantee that the creditor had not brought an action on his demand within two years and six months from the qualification of the personal representatives, is no defense.

FROM KNOX.

Appeal from the decree of the Chancery Court at Knoxville. O. P. TEMPLE, Ch.

WEBB for complainants.

CALDWELL & WASHINGTON for defendants.

COOPER, J., delivered the opinion of the court.

The complainants file this bill as creditors of Benjamin Looney, deceased, on behalf of themselves and all other creditors of the estate, to set aside as fraudulent, certain conveyances and gifts of real and personal property, made by Looney in his lifetime to the defendants, and to subject the property conveyed to the satisfaction of their demands. The defendants filed separate pleas to so much of the bill as related to the several demands of the complainants. These pleas

were, on argument, held sufficient, and upon issue joined on their truth, were found true. The bill was thereupon dismissed, and complainants have brought the case before us by writ of error.

The complainant Armstrong was, and now C. D. Berry, in his place, is administrator *de bonis non*, with the will annexed, of John Cocke, deceased. According to the bill, his demand originated on the 29th of December, 1855, by the execution by Benjamin Looney of two notes under seal for $435 each, payable at two and three years respectively. On the 26th of January, 1868, Armstrong, as administrator, brought suit at law on these bills single against Benjamin Looney. Pending the suit, on the 20th of March, 1868, Looney died, and in April of that year Jane Looney was appointed and qualified as administratrix of his estate. The suit, the bill alleges, was revived against her, and such proceedings were had therein that, on the 22d of October, 1869, a judgment was rendered against her as administratrix, and in favor of the plaintiff for $1,588.39, on which execution issued and was returned *nulla bona*. The bill states that shortly thereafter Jane Looney resigned the administration of the estate, without fully administering it, and more than six months have since elapsed and no one can be found to administer the estate. The bill then sets out the gifts and conveyances of Benjamin Looney to the defendants, and alleges that they were made to hinder and delay the grantor's creditors.

To so much of the bill as relates to the demand of this complainant, the defendants file a plea, in sub-

stance, that Jane Looney resigned the administration of the estate of Benjamin Looney, and her resignation was regularly accepted on the 5th of April, 1869, before the recovery of judgment in the suit at law.

The bill treats the resignation of the administratrix as valid, and the plea is that this valid resignation was before the recovery of judgment. The argument upon the facts thus plead is, that the subsequent judgment being against a person not at the time the personal representative of Benjamin Looney, is a nullity. If the soundness of this conclusion be conceded, which may admit of grave doubt, and if it be further conceded that the facts set forth in the bill and plea show a valid resignation, which is even more doubtful, the sufficiency of the plea rests on the assumption that the bill cannot be sustained, so far as this demand is concerned, without a judgment thereon against the personal representative of the fraudulent grantor. But this is clearly an error. The defendants are only before the court as fraudulent grantees, and as against them no judgment is required to sustain the bill. Since the act of 1852, ch. 365, brought into the Code, sec. 4288, *et seq.*, any creditor, without first having recovered a judgment at law, may file a bill to set aside fraudulent conveyances and devices. And the creditors of the estate of a decedent are not required to proceed against the property of the estate before asserting their rights against a fraudulent grantee. *Spencer* v. *Armstrong*, 12 Heis., 707. And independent of statute, it has been held, that the creditors of a deceased debtor, who have exhausted their remedy at

law against the estate, although they have not obtained judgment on their claims, may file such a bill. *Haston* v. *Castner*, 29 N. J. Eq., 536; *Shurts* v. *Howell*, 30 N. J. Eq., 418. The bill shows and the plea concedes, that the complainant cannot further proceed at law for want of a personal representative. The Chancellor erred in sustaining the plea, and the decree must be reversed with costs, and the cause remanded for further proceedings.

To so much of the bill as relates to the demand of the complainant, Sarah E. Dunlap, which was a claim against Benjamin Looney as surety on the bond of the complainant's guardian, the defendants pleaded that Jane Looney had been appointed and qualified as administratrix of Benjamin Looney, deceased, on the 6th of April, 1868; that the complainant was a citizen of the State at the death of Benjamin Looney, and so continued to be, her claim being due long before, and had not brought suit for more than two years and six months after the qualification of the said Jane Looney as administratrix. The bill shows on its face a resignation of the administration by Jane Looney, accepted by the County Court, and the plea is fatally defective, and would be so strictly without any averment in the bill on the subject, in not averring that the administration of Jane Looney continued for at least two years and six months, or some administration for the time necessary to create the bar. And the plea, if formally good, would be insufficient for another reason. The statute of limitation pleaded is intended for the protection of the estates of decedents, in terms

applies to actions against executors and administrators, and may be relied on by the personal representative or the heirs, when sued as such to reach the property descended. Code, sections 2279, 2784. It has no application to an action against a fraudulent grantee, in favor of such grantee.

The decree below must be reversed as to this plea also, and the cause remanded for further proceedings.

W. T. GARDNER *v.* J. F. J. LEWIS, County Court Clerk.

PRIVILEGE LICENSE. *Wagon.* A farmer who, after laying by his crop, used his farm wagon with a team of two horses to haul wood for a money consideration, is not required to take out a transfer license, under the act of 1868, ch. 79, sec. 5, and subsequent acts in *pari materia*.

FROM KNOX.

Appeal in error from the Criminal Court of Knox county. M. L. HALL, J.

W. C. LEDGERWOOD for Gardner.

ATTORNEY-GENERAL LEA for Lewis.

COOPER, J., delivered the opinion of the court.

By the agreed state of facts in this case, it ap-

pears that Gardner is a farmer, owning a two horse wagon and team which he uses on his farm for hauling purposes, and not in regular hauling as a drayman. In June, 1879, after his crop was laid by, he was employed by a manufacturer of bricks to haul wood from the line of the K. & O. railroad to his brick yard, with the two horse wagon and team. The wood was thrown from the cars about one hundred and fifty yards from Gardner's house, and hauled to the brick yard about half a mile from Gardner's place. Lewis, as clerk of the county court, required Gardner to pay $3.75 for a license, being the amount fixed by the statute for license and clerk's fee. The hauling was outside of the corporation of Knoxville, and was done for a money consideration. The question submitted is whether, on this state of facts, Gardner was required to take out a license.

By the act of 1867–8, ch. 79, sec. 5, clause 8 (T. & S. Rev., sec. 553a, sub-sec. 38), it is provided, "Each express wagon or cart, including wagons or carts engaged in transferring, other than those belonging to express or omnibus companies, shall take out a license annually from the county court clerk, and shall pay a tax for each express wagon five dollars, each express cart five dollars, each transfer wagon (two horse) ten dollars, each transfer wagon (four horse) fifteen dollars."

By the act of 1868–9, ch. 45, sec. 3 (T. & S. Rev., sec. 553a, sub-sec. 39), it is provided, "So much of the said act of March 13, 1868, as refers to express wagons, transfer wagons and carts, shall not be

so construed as to include vehicles other than wagons and carts regularly in the business of expressage and transfer."

Again, by the act of 1869, ch. 30 (T. & S. Rev., sec. 553a, sub-sec. 40), it is enacted, "That an act to amend the revenue laws of this State, passed on the 13th of March, 1868, shall not be so construed as to compel persons to pay tax on farm wagons, or such wagons as are used promiscuously as farm wagons, and no such wagons shall be known as transfer wagons, as denominated in said law."

Once more, by the act of 1870, ch. 94 (T. & S. Rev., sec. 553a, sub-sec. 41), it is provided, "That so much of the acts passed the 13th of March, 1868, and February 19, 1869, as imposes a tax on wagons hauling corn, hay, oats, fodder, wood, ore, coal, or pig iron, be and the same is hereby repealed."

The act of 1879, ch. 97, sec. 1, is: "That sub-sec. 38 of sec. 553a, of Thompson & Steger's edition of the Code, which imposes a privilege tax on express wagons, express carts, and transfer wagons, be and the same is hereby so amended as to read: For wagons, drays, and all other vehicles drawn by one horse, one dollar; two horses, two dollars, and one dollar for each additional horse used, except for those used for farm wagons, and by the original vendor, or producer of the products of the soil or dairy, raised or produced by himself."

"Sec. 2. That sub-sec. 41 of sec. 553a of the Code be and the same is hereby so amended as to strike out of said section coal and pig iron."

The original act required a license for "each express wagon or cart, including wagons or carts engaged in transferring, other than those belonging to express or omnibus companies." The first section of the act of 1879 changes the rates of taxation for the license. But by the residue of the curious series of acts cited, the law is made not to apply to "farm wagons, or such wagons as are used promiscuously as farm wagons," nor to the hauling by wagons and carts of "corn, hay, oats, fodder, wood, ore," and is expressly limited to "wagons and carts regularly in the business of expressage and transfer." The result is to render it very difficult for the county court clerk to know when a farmer, by the use of his wagon, which is also used for farming purposes, may come within the purview of the license law. It seems doubtful whether he can be required to take out a license for any wagon or cart not "regularly in the business of expressage and transfer." But it seems very clear that the hauling of "wood," together with corn, hay, oats, fodder and ore, is withdrawn from the provisions of the law, and that wood may be transferred without a license.

In this view the judgment of the criminal court in favor of Gardner is correct, and must be affirmed with costs.

3L 199
4L 31
5L 216
5L 268
6L 276
11L 22

E. C. Camp *v.* Knox County.

County Warrants. *Not negotiable and do not bear interest.* A county warrant, although made payable to a person named or order, is not a negotiable instrument, nor does it bear interest after demand of payment.

FROM KNOX.

Appeal in error from the Criminal Court of Knox county. M. L. Hall, J.

E. C. Camp for Camp.

James Comfort for county.

Cooper, J., delivered the opinion of the court.

The question raised by the record is, whether a county warrant bears interest after demand of payment. The warrant in controversy, of which the plaintiff is owner by endorsement of the payees, reads as follows:

"No. 722. State of Tennessee. Knox county. Trustee of Knox county:

"Pay to Logan & Luckey, or order, three hundred dollars, being the amount legally allowed for attorney's fees for county. Given under my hand at office this 3d day of July, A.D., 1878.

"$300. T. W. Kearns,

"Chairman County Court."

The judge who tried the cause in the court below without a jury was of opinion that the warrant did not bear interest, and sustained a plea of tender of the debt, with the money brought into court, ordered the money to be paid to the plaintiff, and gave judgment against him for costs. He has appealed in error. The proof shows repeated demands of payment before suit brought.

By the Code, sec. 421: "The judge or chairman of the county court shall be the accounting officer and general agent of the county, and as such he shall have power, and it shall be his duty:

. . . . . .

"4. To audit all claims for money against the county.

"5. To draw all warrants on the county treasury.

. . . . . .

"8. To enter in a book, to be known as the warrant book, in the order of issuance, the number, date, amount and name of the drawee, of each warrant drawn upon the treasury."

By the Code, sec. 422: "No money shall be drawn out of the treasury of the county except upon the warrant of the judge or chairman of the county court."

By the Code, sec. 427: "It shall be the duty of the county trustee:

. . . . . .

"3. When a warrant is presented to him for payment to enter it in a book kept by him for the purpose, ruled in columns, so as successively to show the number, payee or holder, date, day of presentation, and amount of the same.

"4. If there be funds in the treasury, not otherwise appropriated, immediately to pay the demand and take up the waarant; otherwise, to deliver it to the owner, with the number endorsed, and afterward to pay it in its numerical order."

By the Code, secs. 429, 431, stringent provisions are given for the enforcement of the payment of warrants in accordance with these provisions, under severe penalties on the trustee.

The effect of these provisions is to establish a mode of reaching money in the county treasury, by having one county officer to audit and another to pay each claim in a prescribed order. The warrant was intended to furnish a voucher to the disbursing officer for his payments. There is not the least intimation of an intention to create negotiable instruments. All the authorities agree that even if the warrant be put into a negotiable form it will not deprive the county of any equity or defense which the county might have against the person in whose favor the warrant is drawn. And the better opinion is that the warrant cannot be made negotiable at all for the reason that it is only prescribed as a mode of reaching money in the county treasury, and the power of issuance does not imply authority to execute negotiable instruments. The question is not whether the county has power to make a bill of exchange or promissory note, but whether the judge or chairman of the county court, when he issues a warrant under the statute, has the power to give it the form and qualities of a negotiable instrument. 1 Dan. Neg. Inst., sec. 427 *et seq.* This court came

to the same conclusion in relation to the warrant of a municipal corporation, drawn by the recorder or mayor on the treasurer, in *Mayor of Nashville* v. *Fisher*, MS. opinion of Judge Freeman at Nashville.

Such warrants, issued as vouchers, do not bear interest. 1 Dan. Neg. Inst., sec. 432. The reason is, that neither the character of the instrument nor the intention of its issuance contemplate such a result. The law distinctly provides for its payment at the earliest possible day when there is money in the treasury, and enforces its payment by severe penalties in the order of its presentation. The money in the county treasury arises principally from the collection of taxes levied for the purpose. The collection of these taxes is often suspended by the Legislature when the public interest is supposed to require the suspension, and the taxes of each year are almost always postponed until the closing months of the year. Persons who deal with the county know these facts, and understand the mode of payment prescribed by law.

A county warrant does not fall within the Code, sec. 1945, for it is not one of the instruments therein enumerated. Whether it can be sued upon at all, or is only *prima facie* evidence of the amount of the claim in a suit upon the original demand, is left in doubt by the authorities. It is unnecessary to express any opinion on the point in this case.

The judgment will be affirmed with costs.

JAMES H. GILBERT *v.* COWAN, MCCLUNG & CO.

HOMESTEAD. *Legal estate may be levied on and sold.* The legal estate of the head of a family in land set apart to him as a homestead may be levied on by execution and sold subject to the homestead right.

FROM KNOX.

Appeal in error from the Circuit of Knox county. S. A. RODGERS, J.

CORNICK & CORNICK for Gilbert.

LOGAN & LUCKEY for Cowan, McClung & Co.

COOPER, J., delivered the opinion of the court.

The defendants are judgment creditors of the complainant, and caused execution to issue thereon. The complainant owns a lot in Knoxville on which he resides, with his family, as a homestead. The sheriff summoned three freeholders to set apart the homestead under the statute. These freeholders were of opinion that the lot and improvements were worth $1,000, and set apart the whole lot as a homestead. The defendants thereupon caused their execution to be levied on the lot, subject to the homestead right. This bill was filed to enjoin a sale under this levy. The defendants demurred because the bill shows that defendants are only seeking to sell the reversionary fee or interest of the complainant in the lot subject to the

homestead right. The Chancellor sustained the demurrer on the strength of *Moore* v. *Hervey*, 1 Leg. Rep., 22. That was a sale of the reversionary estate under a mortgage by the husband alone, subject to the homestead right. The reasons given are that the sale would not interfere with the homestead, and that a postponement of the sale to the end of the homestead estate would often defeat creditors altogether, and these reasons still more forcibly apply to the case of a judgment creditor.

The decree will be affirmed with costs.

3L 204
6L 64
9L 528
9L 532

JNO. T. MCEWEN *et als. v.* J. M. GILLESPIE *et als.*

SUPREME COURT. *Practice. Will not remand. When.* The Supreme Court, upon sustaining a demurrer to a bill, will not remand for the insertion of facts known to complainant at the filing of the bill, where the successful cause of demurrer was based on the absence of such facts, and the insufficiency in law of the statements actually made to authorize the relief sought.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

VANDYKE, COOK & VANDYKE for complainants.

KEY & RICHMOND and M. H. CLIFT for defendants.

COOPER, J., delivered the opinion of the court.

The bill in this case was filed by the personal representatives and heirs of W. S. McEwen, deceased, against the personal representative and heirs of J. C. Gillespie, deceased, and the personal representative and heirs of George L. Gillespie, deceased, to have a settlement of the business of George L. Gillespie & Co., a firm composed of W. S. McEwen, J. C. and G. L. Gillespie, and which terminated in the year 1855, and to impound the unpaid purchase money of a tract of land sold by George L. Gillespie, the title to which land the bill avers was taken to the said Geo. L. individually, during the existence of the firm, although bought with the partnership funds. The bill was filed on the 11th of September, 1876, and shows that W. S. McEwen died in 1873. Upon demurrer filed the bill seems to have been amended, but in what respects does not distinctly appear. Upon hearing at this term the demurrer was sustained upon the assignment of lapse of time, and the bill dismissed. An application is now made, unsupported in any way, "to remand the case to the chancery court with leave to amend by proper averments, excusing the delay in filing the bill, if the facts of the case will justify."

It is obvious that to entertain such an application the court would be virtually holding that, in all cases where a demurrer is sustained upon grounds which might be obviated by amendment, the cause will be remanded with leave to amend "if the facts of

the case will justify." But we have already held, in an analogous case, that, upon sustaining a demurrer, this court will not remand for the insertion of facts known to the complainant at the time of the filing of the bill, the demurrer having been based upon the absence of such facts, and the insufficiency in law of the statements actually made to entitle the complainant to the relief sought. *Fogg* v. *Union Bank*, 4 Baxter, 539. A party proceeds at his peril who refuses to amend under these circumstances, and his refusal is, moreover, the strongest possible evidence that his facts do not justify an amendment.

In the case before us, although the bill alleges the payment of partnership debts by complainant's testator, there is no allegation that the testator and intestate of defendants have not also paid debts. And we are thoroughly satisfied that the effort to set up a resulting trust in land by the use of partnership funds, after the lapse of over twenty-one years from the vesting of the legal title in George L. Gillespie, and after the death of all the parties, would be literally hopeless.

The application will be refused.

T. J. Howard *v.* John Long.

Appeal. *Appeal bond. Must be executed within two days.* An appeal from a judgment of a justice of the peace must be prayed and granted within two days, Sunday excepted, and no appeal can be granted except upon the execution of a bond or by taking the pauper's oath.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. Trewhitt, J.

J. A. Moon and Lewis Shepherd for Howard.

Key & Richmond for Long.

McFarland, J., delivered the opinion of the court.

This action was commenced before a justice of the peace, who gave judgment for the plaintiff. In the circuit court the judgment was for the defendant. The plaintiff has appealed in error. The only question is whether the circuit court erred in overruling the plaintiff's motion to dismiss the defendant's appeal. The judgment of the justice, rendered on the 13th of August, 1877, was written out, dated and signed of that day. There is nothing on the paper to show an appeal except the following, which the record shows is endorsed on the appeal bond:

"The appeal was prayed and granted on filing a competent bond, and the plaintiff's attorney offered to

give bond the same day, but the court was busy, and in the afternoon the court was instructed by plaintiff to hold the papers, as there was a probability of a compromise. J. W. Leigh, J. P."

The appeal bond executed by the defendant and surety appears in the record, dated the 12th of November, 1877, and upon its face shows that it was for the prosecution of an appeal "this day prayed and granted" from the judgment of the justice rendered the 13th of August, 1877. The foregoing entry of the justice, showing that appeal was prayed and granted upon competent bond, etc., is not dated, but as the record shows that it is endorsed on the appeal bond, and the appeal bond was not executed until the 12th of November, it was probably made at that time. Upon the hearing of the motion to dismiss, the affidavit of the justice was introduced, showing that as soon as the judgment was rendered the defendant, by his attorney, prayed an appeal, which was granted to him, and he then offered to execute bond and security, but being busy the justice requested him to call again; his recollection is that he did call again within the two days, and requested a blank bond to fill up, but the justice being again very busy requested that he call again. Shortly after he was informed by plaintiff's attorney that the matter would probably be settled, and not to be in a hurry about taking the papers to court. He was also informed by defendant's attorney that there was prospect of a compromise, and that he would give the bond at any time. That the delay was caused by the press of business

in his office, and that no delay was requested by defendant or his attorney. Upon this the motion to dismiss was overruled.

By the Code, sec. 3140, two entire days, Sundays excluded, are allowed in which to pray an appeal from the judgment of a justice of the peace. By the next section it is provided that before the appeal is granted bond and security must be given. It has been held that by the very letter of the statute the justice has no authority to grant an appeal after the two days. *Gilbert* v. *Diver*, 3 Head, 463. And as the bond must be given before the appeal is granted, it would seem necessarily to follow that both the appeal must be granted and the bond given within the two days. But in the case of *McCarver* v. *Jenkins*, 2 Heis., 629, it appeared that the appeal bond bore date the day the judgment was rendered, and showed an appeal was then prayed and granted. It appeared, however, that in fact the bond was not filed for some seven days afterward. The justice proved that the appeal was prayed and granted within the two days. This court held that the judgment of the circuit court dismissing the appeal was erroneous. In the subsequent case of *Poindexter* v. *Cannon*, 1 Leg. Rep., 205, it appeared that the justice had within these two days granted an appeal upon bond and security being given, and had allowed twenty-five days within which to give bond, and within this time the bond was given. It was held that the appeal was properly dismissed. Referring to the case of McCarver *v.* Jenkins, Judge Deaderick said that the court was not disposed to ex-

tend the doctrine of the case any further; that if the justice could grant twenty-five days within which to execute bond, he might grant fifty days or longer. The bond in the present case was executed three months less one day after the judgment was rendered. The entry made by the justice on the bond, admitting, as is the probable fact, that by mistake the word "plaintiff" was used for "defendant," shows that within the two days the appeal was prayed by defendant and granted upon a "competent" bond being given. The justice, it is true, says in his affidavit that the appeal was granted, but he could only grant the appeal on bond or the pauper's oath, so that in fact the appeal was only granted upon condition the bond was given. And the only difference between this case and the case of Poindexter *v.* Cannon is, that in that case the justice in writing granted the party twenty-five days within which to give bond, and in this case by parol understanding between the justice and the attorney of the defendant the time was extended to almost three months. The motion to dismiss was made in proper time, and the ground specifically pointed out. Upon the authority of the case of Poindexter *v.* Cannon, we must hold that the motion should have been sustained.

If the latter case does not in effect overrule the case of McCarver *v.* Jenkins, it at least confines it to very narrow limits. The latter case meets our approval.

The judgment will be reversed and the motion to dismiss the appeal from the justice sustained.

8L 211
8L 119
1pi 449

HUGH HARPER *v.* THE STATE.

1. MALT LIQUORS. *Druggist. Physician's prescription.* A regular licensed druggist has the right to sell malt liquors upon the prescription of a regular practicing physician, but the selling or giving spirituous, vinous or malt liquors, except upon the prescription of a regular practicing physician, subjects the offender to the penalties prescribed by law for selling liquor without license.

2. SAME. *Same. Same.* If the prescription be a subterfuge to evade the law, the druggist, physician and buyer are liable to indictment or presentment.

FROM GREENE.

Appeal in error from the Circuit Court of Greene county. N. HACKER, J.

H. H. INGERSOLL for Harper.

ATTORNEY-GENERAL LEA for the State.

TURNEY, J., delivered the opinion of the court.

The plaintiff in error was presented and convicted for selling a glass of lager beer to John J. Mitchell within four miles of an incorporated institution of learning.

The defense is, the accused was a druggist, and sold the beer on the prescription of a physician. The defense is predicated of the act of 1870, ch. 51, secs. 51, 52, Thompson & Steger's Code, sees. 696a and 696b, which are, "that hereafter all regularly licensed druggists in this State, without obtaining an additional

license therefor, be and they are hereby authorized to furnish vinous liquor to any church officer to be used for sacramental or communion purposes, or to fill the prescription of any regular practicing physician prescribing spirituous or vinous liquors as a medical remedy.

"The sale or gift of any spirituous, vinous or malt liquors by any druggist in this State, except as provided in the first section of this act, shall be unlawful, and subject the person offending to all the penalties now prescribed by law for selling liquors without license."

This statute must be construed as a whole, and so construing it we must conclude the Legislature meant liquors might be given or sold upon the prescription of a practicing physician.

The second section of the act prescribes the penalty for a violation of the first, and includes malt with vinous and spirituous liquors. Taking the two sections together, and reading as the Legislature intended them, their interpretion is, that selling or giving spirituous, vinous or malt liquors, except upon the prescription of a practicing physician, shall subject the offender to all the penalties now prescribed by law for selling liquor without license.

It is suggested in argument that the prescription of a physician may be resorted to in fraud and defeat the law. When this is done, a question as to the conduct of the physician who indulges in such practices as well as of the tippler who confederates with him, and also of him who buys under such col-

lusion is presented for the consideration of grand juries and criminal courts. Certainly the law is broad enough to embrace all violations of it, and in whatever shape they may come.

In this case the proof shows that "the prescription was one that run on indefinitely," and that the buyer "got beer on it oftener than once." These things demand an investigation whether the prescription in this particular case is not a mere subterfuge to evade the law, set on foot by the tippler, physician and buyer. The record suggests the strong probability that all these have violated the law, and are amenable to the penalties denounced by it.

Reverse the judgment and remand the cause.

G. W. and J. R. HENLEY *v.* J. and R. R. CLIBORNE.

1. CHANCERY PRACTICE AND PLEADING. *Jurisdiction. Injunction bond. Damages.* The chancery court has jurisdiction to inquire and fix the damages resulting from the wrongful suing out of writs of injunction, and upon a reference as to damages the securities upon the injunction bond may plead *non est factum*, or any other legal defense that would be proper in an action of law upon the bond.

2. SAME. *Burden of proof.* Upon a plea of *non est factum* the burden of proof is upon the party insisting upon the validity of the bond.

FROM MONROE.

Appeal from the Chancery Court at Madisonville. W. M. BRADFORD, Ch.

HICKS for complainant.

YOUNG for defendant.

TURNEY, J., delivered the opinion of the court.

An injunction bond, properly and regularly executed in a chancery proceeding, is a necessary incident to and a part of such proceeding. The court in which it is executed has ample jurisdiction to inquire of, ascertain and fix the damages resulting to parties because of the suing out of the writs of injunction, and pass judgment upon the bond against the principal and securities thereto. It is the duty of the court, when invoked thereto, to finally settle and adjudge the rights of the parties in all things growing out of the proceedings before it, or arising from or upon incidents to such proceedings, and thereby prevent multiplicity of suits by referring questions to other tribunals.

Upon reference to the master to inquire of the damages, the securities being notified to appear, it is a proper practice to plead any legal defenses that could be of avail to the securities if the suit were brought at law upon the bond, or that might at the time be employed in an original bill. The inquiry

as to the amount of damages resulting from the act of the securities, necessarily involves the inquiry, not only of the extent of an act done, but also the question whether any act was done. The securities may as defense plead *non est factum* to the bond, as was done in this case, and have the question of the execution of the bond by them first determined.

The pleas presenting the proper issue, the burden of proof is upon him who insists upon the validity of the bond, a fact that must be established by a preponderance of evidence, according to the measure required of all plaintiffs in civil actions. That preponderance has not been obtained in this case, and the motion is discharged.

Reverse the decree.

31 215
12L 680

Betterton *v.* Roope.

Debtor. *Creditor. His duties in reference to collaterals. Negligence. Case:* R. was indebted by account to B., not having the money to pay he endorsed to B. a draft on C., due in thirty days, the proceeds to be credited on his account. The draft was not presented at maturity, and shortly thereafter C. became insolvent. Held, that B. cannot maintain suit against R., either on the original debt or the draft. There was such negligence on the part of the creditor as injured and

released the debtor. He cannot impose upon the debtor the loss which was occasioned by his own neglect while controlling or having the right to control the draft.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. TREWHITT, J.

E. M. DODSON for Betterton.

LEWIS SHEPHERD for Roope.

FREEMAN, J., delivered the opinion of the court.

Betterton sued defendant by summons before a justice of the peace for Hamilton county in a plea of debt due by account. The case went by appeal to the circuit court, where it was tried by the court, a jury being waived, and judgment rendered for plaintiff for the amount of his account.

The facts necessary to be stated are, that on the 9th of June, 1877, the defendant was indebted to plaintiff by the amount of the account sued for in this case. When called on for the money he stated he did not have it, but endorsed and handed plaintiff a draft, drawn by the agent of the company, on Bartow iron company, payable at Rome, Ga., thirty days after the above date. He said to plaintiff at the time, you can use the draft. At the same time a receipt was executed as follows:

"Received of James Roope a draft on Bartow iron company for one hundred and twenty dollars, payable

thirty days from date, dated June 9, 1877, to be credited on his draft (account) when collected."

Plaintiff endorsed the draft to the Discount and Deposit Bank of Chattanooga, and got the money on it. A few days after the draft fell due, it not having been paid, plaintiff paid it to the bank and took it up.

The Bartow iron company was solvent both in Georgia and at Chattanooga when the draft was drawn, and when it fell due, and was paying its paper promptly, until the 15th or 16th of July, three days after the maturity of this draft. The company had kept an agent at Rome authorized to accept drafts and pay them, until a few days before this draft was due, but had removed the agency to Chattanooga, where all accepted drafts were paid up to the day of suspension above stated. From the facts shown in proof it is clear, if the draft had been presented when due, it would have been paid.

It further appears that in August, 1877, plaintiff sued defendant Roope, the Bartow Iron Co., and Bank of Discount and Deposit, on this draft, before L. B. Headrick, a justice of the peace, who, after hearing, entered a regular decree as his judgment in the case, with the reasons for his conclusions. We need not examine the correctness of this judgment, suffice it to say he gave judgment in favor of Roope and the company, and against the bank, and was careful to add "that this was without prejudice to the rights of the plaintiff or any one else to sue over again either on the paper or for any cause of action, and in any

form." The bank has appealed, but what has been the result of the case we do not know. As it is claimed this is an adjudication of the rights of the parties, and conclusive of the present case, we need but say that this cannot be so held. That was a suit on the draft against defendant as endorser, a judgment in his favor in that case was not an adjudication of the questions involved in this case, which are his liability on the facts for the original indebtedness due by account, and his rights on the facts we have stated, arising out of the failure of the holder of the paper to present it for acceptance or payment.

It is clear from the testimony, and especially the contract of the parties in the concluding part of the receipt, that the draft was not taken as a payment of the account. The amount was to be credited on the account when collected, not having been collected it cannot be claimed the credit shall be given by the language and letter of the contract. Is he entitled to get the benefit of this draft by way of recompment or otherwise because of failure to present for payment as a matter of law growing out of the contract of the parties?

There was no need of acceptance or presentment for such acceptance in this case, the bill being drawn by the party or company through its agent or the company. Dan. Neg. Inst. 8, sec. 482. The transfer of the draft was but as collateral to the debt, and the creditor so receiving the paper takes the place of the holder as to his rights on the paper, and assumes

the duties of such holder. See Dan. Neg. Inst., vol. 1, 2d Ed., sec. 828.

The fair construction of the contract of the parties is, that he will use proper diligence in the collection of the security, and will account for the same, and he is certainly forbidden such negligence as shall produce loss to the debtor who transfers the paper to him. His duties arise out of the transaction. He receives from his debtor a draft or negotiable paper which, by law, is due on a certain day. It is his duty to present the paper for payment on that day, and as he has the endorsement of his debtor on the paper, he ought probably to give him notice of the failure to pay; certainly so, if he seeks to hold him on the paper or his endorsement.

The question of notice to the endorsing debtor in this case is not, however, material. The question is, whether there was a neglect of duty on the part of the creditor receiving the draft, by reason of which the debtor has been injured. That this is true is beyond question. If the creditor had received of his debtor a check and failed to present it, the principle would have been the same precisely. If he had received part or all the money on the draft, and failed to credit it, beyond question such receipt would have been a good defense *protanto*, or in whole, to collection of the debt due by the account; so we think, on sound principle, a failure to receive when he ought to have received, such failure being the result of his own negligence or the party to whom he had endorsed it, should equally work the same result. He fails to ac-

count in either case for the collateral. He has had the benefit of it as a security for his debt, and took it as a means of payment, thus depriving the original holder of the right to control it, and putting himself in his place. He cannot impose upon him the entire loss, when it results from his own neglect while controlling or having the right to control the paper. It may have been the neglect of the bank to which he endorsed it, and received the money in advance on it for his own use. If so, he cannot avoid his own liability, but must look to the bank for his indemnity, if he has any remedy. He cannot inflict the loss on his debtor.

We find authorities sustaining these views. In a recent English case, says Mr. Daniel (Neg. Inst., sec. 828), where the defendant endorsed to the plaintiff a bill, of which he was endorser, as collateral security for a debt of greater amount, then due, the residue of which he paid in cash, and the plaintiff failed to make presentment or to give notice, it was held that he had lost recourse upon his endorser, both on the bill and on the original debt. Byles, J., said "That as they had the rights so they had the duties of the holders." See cases cited; *Peacock* v. *Purcell*, 14 C. B., N. S., sec. 728; see also Am. R. L., vol. 3, 440.

So, too, in a late case in New York where the defendants, a firm in Buffalo, being indebted to the plaintiff's firm in New York, forwarded by mail a draft on another business house in New York. The plaintiff, about half past one o'clock on the day of the receipt of the

draft, presented it to the drawers and received a check for the amount. This party had funds in the bank on which the check was drawn, and the check would have been honored if it had been presented that day. The check, however, was deposited by the plaintiff in his own bank, and did not reach the other bank until twelve o'clock the next day, and after the drawer had failed. It was held that the plaintiff was guilty of laches in failing to present the check on the day it was received, and the defendants were released from liability for their indebtedness. *Smith* v. *Miller*, 43 N. Y., 171; 3d vol. Am. R., 690.

This case is put on the grounds that a party receiving securities of this kind may so deal with them as to discharge his debtor, whether they be paid or not, that he may make them his own by such dealing, as by giving time for payment or other act prejudicial to the debtor, and this result will follow any neglect or laches of the creditor in obtaining payment of negotiable instruments transferred, from which loss or injury ensues.

By receiving the securities, says the court, and assuming the collection, he undertakes to do all that the law requires to be done to obtain payment, and if he fails in the performance of that duty the debtor is discharged, citing *Canndye* v. *Allenby*, 6 Barn. & Cresw., 373; Story on Bills, sec. 109. Laches which would discharge the drawer or endorser of a bill will as effectually extinguish the debt for the payment of which a bill or other negotiable security is transferred. Story on Bills, sec. 419, 109 and note. See cases

cited in this case. These authorities seem conclusive of the question, and are so consistent with the right of the case, that we feel no hesitancy in adopting them.

The result is, the judgment of the court below is reversed, and a judgment for the defendant will be entered here.

STATE OF TENNESSEE and MEIGS COUNTY *v.* BUTLER.

PATENT RIGHT. *Sale of. Not subject to license tax.* The State has no right to require a license in order to a sale of the right to make and manufacture a patented article.

FROM MEIGS.

Appeal in error from the Circuit Court of Meigs county. D. C. TREWHITT, J.

ATTORNEY-GENERAL LEA for the State.

MILLBURN and BRIANT for Butler.

FREEMAN, J., delivered the opinion of the court.

This is a proceeding by distress warrant to enforce the collection of a license or privilege tax for an alleged sale of a right to make or manufacture a cer-

tain "straw cutter," the "exclusive right to make, use and vend the said invention throughout the United States and territories," being in defendant by letters patent granted by Commissioner of Patents in 1879.

The only question in the case is the right of the State to impose a license or privilege tax on a sale of such right. Congress, under the Constitution of the United States, by act 1, sec. 8, has conferred on it the power "to promote the progress of science and the useful arts by securing to authors and inventors the exclusive right to their respective writings and discoveries." This power has been exercised by the enactment of the laws under which this patent was granted. To use the language of Judge Swayne in the case of *Wooten* v. *Barker*, 5 Reporter, 260, "Congress has not only fixed the manner in which a patent may be obtained, but has prescribed the manner in which it may be sold, and has imposed penalties for the infringement thereof. The national government has, therefore, made the patent right property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by the State that will impair the right to make, use, or vend any patent, or the right to assign the patent or any part of it, is forbidden by the highest organic law."

If this principle be correct, and we see no cause to doubt it, in the case of sale of a right to make or manufacture the patented article, then it seems clear the statute of the State requiring a license in order

to the sale of the patent, must be held void, and in violation of the Constitution of the United States and laws made in pursuance thereof. If the State can forbid the use and enjoyment of the right granted except on terms of paying for the privilege the sum of ten dollars, she may as well exact ten hundred, or forbid it entirely. In this way the privilege granted may be rendered valueless, and the right purchased from the United States be entirely destroyed for all practicable purposes. We hold this cannot be done, and the right of the patentee to sell or assign his privilege granted to him by the United States for the period fixed in his letters patent is beyond State control or regulation.

His Honor the Circuit Judge so held, and we affirm his judgment.

3L 324
5L 289
10L 601
10L 706
12L 601

G. C. C. and P. KERR, Ex'rs, *v.* DAVID KERR and WILLIAM HUMBARD.

1. CHANCERY COURT. *Jurisdiction to aid judgment creditor.* Equity has jurisdiction to aid a judgment creditor in removing embarrassments in the way of a sale, so as to prevent a sacrifice of the property, either by suspending the sale until the obstacle is removed, or selling the entire property, and disposing of the proceeds of sale among the parties entitled.

2. CHANCERY PRACTICE AND PLEADINGS. *Presumption in favor of pleader on motion to dismiss.* In this State the presumption is in favor of rather than against the pleader on motion to dismiss.

FROM BRADLEY.

Appeal in error from the Chancery Court at Cleveland. W. M. BRADFORD, Ch.

J. H. GAUT and MCGINLEY & HOOD for complainants.

P. B. MAYFIELD for defendants.

COOPER, J., delivered the opinion of the court.

The complainants, as executors of the will of Jesse Kerr, deceased, having recovered a judgment at law on the 7th of May, 1875, against the defendant David Kerr for $——, on which execution issued and was returned October 28, 1876, *nulla bona*, filed this attachment and injunction bill on the 22d of February, 1876, to reach certain realty previously attached in equity by the defendant Wm. Humbard. They charge that the defendant Kerr "has title" to several hundred acres of land described generally, the exact metes and bounds of which they are unable to give because of the destruction of the register's books during the war. They state that these lands are encumbered by an attachment thereon sued out by the defendant Humbard in the same court on the 4th of March, 1872, under a bill alleging that the defendant Kerr was about fradulently to dispose thereof, and seeking to subject the same to the satisfaction of a judgment in his favor for $800, which suit was still pending.

They say that the pendency of this suit, and attachment and injunction sued out under it, together with the uncertainty in regard to the lands, renders it necessary to come into equity for relief, and they pray that "all the right, title, interest, and claim which David Kerr has in the lands, be it legal or equitable," be attached and sold, and the proceeds, or the surplus proceeds, of any sale made in Humbard's case, be applied to the satisfaction of their demand. The defendant Kerr moved to discharge the attachment, which motion was sustained by the Chancellor. He also moved to dismiss the bill, which motion was overruled. The defendants failing to answer, the bill was taken for confessed against them, and on the hearing the Chancellor gave the complainants a decree for the sale of the land, subject to Humbard's lien, if any. The defendant Kerr appealed.

The argument submitted on behalf of the appellant is, that his motion to dismiss the bill should have been sustained, the ground of the motion being that the remedy of the complainants was plain and unembarrassed at law, Humbard's attachment having the same priority in equity as at law, and constituting no such encumbrance as justified a resort to equity. The argument requires to sustain it two postulates—one, that the title of the defendant Kerr to the land was legal, and otherwise open to execution; the other, that the relief in equity would be, upon this assumption, the same as at law under the circumstances stated in the bill.

Upon the first point the bill is equivocal. It avers

that the defendant Kerr "has title" to the property. If the presumption is against the pleader, it may well be agreed that this language implies a legal title, for, in common parlance, the word title usually imports a legal title. In England the presumption is against the pleader upon the idea that he will always state his case most favorably for himself. *Columbine* v. *Chicester*, 2 Phil., 28; *Foss* v. *Harbottle*, 2 Hare, 502. In this State every reasonable presumption is to be made in favor of rather than against the bill. *Lincoln* v. *Purcell*, 2 Head, 154; *Hobbs* v. *Memphis R. Co.*, 9 Heis., 873. And a motion to dismiss a bill for want of equity will not lie where a case proper for equitable relief appears on the face of the bill, although defectively stated. *Thompson* v. *Paul*, 8 Hum., 114; *Henderson* v. *Matthews*, 1 Lea, 34. The bill avers that the defendant has title, not saying legal title, states the return on the execution against the defendant of *nulla bona*, which form of words usually implies a general return of no property to be found, and asks a sale of the defendant's interest in the land, be it legal or equitable. Treating the language of the bill as leaving the point in doubt whether the title was legal or equitable, the motion to dismiss was properly overruled. On the trial the sheriff's return was introduced, showing that no personal property was found, and that the land was not levied on because encumbered by the attachment of Humbard. But the doubt is not necessarily removed thereby, and, in the absence of any defense, the court may still give the

complainants the benefit of the doubt in furtherance of the ends of justice.

If it be conceded, however, that the title was legal, it is a mistake to suppose that the remedy was the same at law and in equity. The sale by execution would necessarily be subject to the prior lien, *quantum valeat*, of Humbard. The uncertainty in relation to that claim would operate prejudicially to the judgment creditor by leaving him in doubt as to what his bid should be. It would also work injuriously to the judgment debtor, in the eye of the law, by deterring bidders. The jurisdiction of equity to aid an execution creditor in removing embarrassments in the way of a sale, so as to prevent a sacrifice of the property, and ascertain the precise interest to be sold, is well settled. *Parrish* v. *Saunders*, 3 Hum., 431; *Long* v. *Page*, 10 Hum., 541; *Haskins* v. *Everett*, 4 Sneed, 531. If the right of the judgment creditor to sell the property is beyond dispute, and in this case it is conceded by the *pro confesso* order, the proper decree in equity is to suspend the sale until the obstacle is removed if in the course of judicial determination, or to sell the entire property and dispose of the proceeds for the benefit of the parties as they might show themselves entitled. The error of the Chancellor was not in taking jurisdiction and giving relief, but in the relief actually given. The counsel of the defendant is justified in saying the decree only gives what might have been had by execution sale if the title of the debtor was legal. It is con-

ceded, however, that Humbard's claim has been held to be of no validity, and the error works no harm.

Affirm the decree with costs.

31L 229
14L 310

COWAN, MCCLUNG & CO. *et al.* *v.* E. MANN *et als.*

1. MARRIED WOMEN. *Marriage Contract. Effect of its not being Registered.* A marriage contract, not registered in a county to which the husband removes is, under act of 1831, Code, sec. 2035, void as to creditors of the husband, and gives no protection to the property against legal process on the part of such creditors. The contract is good, however, between husband and wife, and the property does not vest absolutely in him, if it be personalty. It is only not protected as against creditors.

2. SAME. *Same. Chose in action.* To be subject, however, to the creditors, if a chose in action, the proceeds must be reduced to possession of the wife, and be in possession of husband when the process attaches to or is fastened on it. If the wife has money in her hands, proceeds of her real estate, and loans it to a firm of which her husband is a member, taking notes for it, this debt cannot be subjected to her husband's creditors. It is a chose in action not reduced to possession in that form.

3. SAME. *Same. Same.* So also a debt purchased by the wife with her money, arising from her separate estate, is not subject to her husband's creditors.

4. SAME. *Same.* The wife held entitled to receive proceeds of trust property conveyed by husband's firm to secure re-payment of money loaned to firm, under facts of this case. *Embry and Young* v. *Robinson*, 7 Hum., 144, Coop. Ed.

FROM KNOX.

Appeal in error from the Chancery Court of Knox county. O. P. TEMPLE, Ch.

WEEB, LUCKEY and CORNICK for complainants.

HENDERSON & JOUROLMON for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed by complainants as creditors of E. Mann & Co., a firm composed of E. Mann and W. T. Mann, seeking to subject certain property, both real and personal, in the county of Knox, to the payment of their debts. We do not understand the claim of the bill to be insisted on in argument here, so far as the real estate is concerned, and need not notice that aspect of the case.

The real contest is, as to the claim of the wife of E. Mann to the sum of $2,940.65, and to a debt against the firm in favor of Wood, Marsh & Co., of Philadelphia, which has been bought by Mrs. Mann, or her *pro rata* of these debts, under a deed of trust made by the firm to one Barnes, by which the assets of the firm were assigned to be sold, and proceeds applied *pro rata* to their debts, the two metioned included.

A short statement will serve to present the facts on which the questions to be decided are raised.

In 1872, Mrs. Mann, then Mrs. Wallace, intermar-

ried with respondent, E. Mann, in the county of Blount. She had a considerable estate, consisting of a valuable tract of land and personal property. By an ante-nuptial contract, this whole estate was secured to her sole, separate and exclusive use, with the amplest power of control and disposition of the same, making her, in this respect, equal to a *feme sole.*

This contract was duly registered in the county of Blount, where the husband then resided, and where the property was situated. Some years afterward, however, Mrs. Mann sold the land to one Wright, for the sum of ten thousand dollars, five thousand of which was paid January, 1875, the next note when it fell due, leaving one note of $2,500 unpaid, which has been used as collateral with one of the banks of Knoxville, a defendant to this suit.

Soon after this sale the parties removed to Knox county. The husband and son engaged in mercantile business, and became insolvent in about a year, making the assignment to Barnes, to which we have referred.

The wife loaned the sum of money secured by the deed of assignment to the firm, taking the firm notes for it. She also, with five hundred dollars of her money derived from the secured estate, and about $200 received as her *pro rata* from the trust, advanced to her by Barnes, the trustee, purchased the large debt due Wood, Marsh & Co., and now claims the *pro rata* share of the assigned fund due on that.

The ante-nuptial marriage contract was not registered in Knox county until about six months after the bill in this case was filed.

The bill claims to have been filed under sec. 4288 of the Code, authorizing a creditor, without first having obtained a judgment at law, to file a bill for himself or on behalf of other creditors, to set aside "fraudulent conveyances of property, or other devices resorted to for the purpose of hindering and delaying creditors, and to subject the property, by sale or otherwise, to payment of the debt." The next section authorizes the issuance of writs of attachment and injunction on filing such a bill, and prescribes the terms of the bond to be given in such cases.

In this case there is no attachment sought nor issued; an injunction is, however, and the parties inhibited from transferring or incumbering the debts sought to be reached, to-wit: the surplus, if any, of the last note, and the Wood, Marsh & Co. debt, and the debt due to Mrs. Mann; and these debts are asked to be declared void, that is, the two debts, and no dividends allowed to be paid by the trustee on them, and any surplus of the note held by the bank appropriated to payment of complainants' debts. Complainants do not, however, insist now on the right to appropriate the surplus of this last note, so that the only question presented is, whether they can have the notes or debts of $2,940.65 and the Wood, Marsh & Co. dividends, indirectly appropriated to their benefit, by declaring the debt as due to the husband, and nothing shall be paid on them to the wife.

The principles of law on the subject of ante-nuptial marriage contracts in our State, in the aspect now presented, are well settled. Before our registry act

of 1831, it had been settled that registration was only necessary to protect against the creditors of the grantor, under the act of 1785. Since the act of 1831, however, it is equally well settled that registration is required in accord with that act and Code, sec. 2035, in order to protect property secured to the wife by a marriage contract from the creditors of the husband.

That section provides that "marriage contracts in which the wife's property before marriage is settled on her or a trustee for her use, shall be registered in the county where the husband resides at the time of marriage, and in any county in the State to which he may remove with the property—and if made out of the State, is to be registered in any county in the State to which they may remove with the property."

With these principles settled, it follows that while the marriage contract was perfectly good, as between the husband and wife, it interposed no obstacle to a creditor of the husband in enforcing by due process of law a claim against the husband or against the property embraced in it for want of registration in the county of Knox, to which he had removed with the property, other things being out of the way.

We have then the case of a husband, with the proceeds of the real estate of his wife in her hands, which property itself before conversion, was not, or would not have been protected in the county of Knox, had it been there located by the marriage contract, for want of registration in the county. It would, however, have stood as any other real estate, and been protected by the act of 1849–50, Code, section 2481,

from the husband's debts, which statute exempts the interest of the husband in the real estate of his wife, acquired by her either before or after marriage in any mode whatever. When the wife sold the real estate, and converted it into money and choses in action, as she had the right to do, it then stood as any other personalty in her hands as wife, so far as the husband's creditors were concerned, in the county of Knox, being unprotected by the marriage contract, for want of registration; as between them (that is husband and wife) it was protected by it, the contract only being void as to creditors.

The chose in action being in the name of the wife, proceeds of her property secured by the marriage contract, would not be subject to his debts, because not reduced to possession, the right of the wife still exististing till then, so that if she survived him the marriage right could not fix on them, and she would be entitled to these notes. 3 Sneed, 540. See Wait's Actions and Defs., vol. 3, 639–40, anthorities there cited.

If chattels had been received for the land or purchased with its proceeds, the possession of the wife would have been the possession of the husband, and as against a creditor in Knox county the marriage contract would have interposed no barrier to their appropriation under process of law to the husband's debts. So, when the money was received by the wife, nothing else appearing, if legal process had been fastened on that while in the possession of the wife, or a lien fixed, the same result would have followed. The pos-

session ot money by the wife is the possession of the husband. *Hudiburg* v. *Youst*, 2 Lea, 627.

But in this case, before any such process has been fastened on this money, or lien fixed on it, the money was loaned by the wife to the firm of Mann & Co., and the chose in action due from that firm is in possession of, and given to the wife, and that is what is sought to be reached in the case of the debt due from the firm to her for loaned money.

We cannot see how the creditor stands in any higher position as to this, than he does as to the notes given for the land, or any other chose in action, the proceeds of which are not reduced to his possession during his coverture. The fallacy of complainant's argument rests in the assumption that in the case of property covered by an unregistered marriage contract, in possession of husband and wife, when it is open to legal process and liable to it at any time, that the right remains, even after the possession of the husband is gone. In other words, that this money became absolutely the husband's property by virtue of the marital right. This is not true. If this theory were correct, and the creditor's right is fixed on the property, because it might have been subjected, then the subsequent registration of the instrument would fail to protect it, as to debts contracted by the husband before registration, though such debts were simply contracts, giving no liens on his property. Such a conclusion would hardly be maintained by complainant's counsel.

The money or a chattel might, as such, have been

subjected to his debt, because of want of registration of the marriage contract, but the right was only in him as against it. As soon as its form is changed so that it ceased to be thus in the possession of the husband by virtue of his marital right, the creditors' right ceases. It did not vest as personalty absolutely in the husband, as between him and his wife, because of the contract valid, as between them. It was only unprotected from legal process by a creditor by the provisions of the act of 1831, and section of the Code embodying that act. It follows, that having failed to fasten on the money while in possession of the wife, when that money has been disposed of, and become a debt due to the wife, it is freed from such liability, and stands as her chose in action, until the money should again come to her hands. A creditor certainly has not the right to enforce the collection of a chose in action due the wife in order that the proceeds may be reduced to possession, vest in the husband, and so be subject to his debt. This is practically what is sought to be done in this case.

The same principle applies to the debt of Wood, Marsh & Co. purchased by her with moneys received from her separate estate and dividends. This is a chose in action due the wife, of which the husband was not possessed at the time of filing this bill, and which cannot be reached directly or indirectly in that form in this proceeding.

The registration of the marriage contract since the bill was filed, as a matter of course, will protect the money when it shall be paid her, as it will be reduced

to possession after that registration. We would reach the same result under the principle of the case of *Embry and Young* v. *Robinson and wife*, 7 Hum., 444, Cooper Ed., and other cases, that a conveyance by a husband of property to a trustee for the benefit of the wife, before liens have attached, in consideration of her money received, and applied to the payment of his debts, which money was only receivable by him by assent of his wife, is based on a valuable consideration, and will be upheld. In fact, the case is one so nearly identical in its circumstances to the one now before us, as that we might well have rested the entire conclusion on the principle thus settled.

The result is, that the Chancellor's decree dismissing the bill is affirmed with costs.

J. M. KING *et al.* v. G. W. MABRY and JOHN F. HENRY.

1. CHANCERY PRACTICE AND PLEADING. *Bill to enjoin trespassers. Possession must be bona fide.* A party suing to enjoin trespassers, claiming to be in exclusive possession of a tract of land, must occupy and hold it *bona fide*, and by such use as is usual, and the land susceptible of.

2. SAME. *Not being in possession, must show title.* Not being in possession, such a party must show a connected chain of title in order to sustain his prayer for an injunction.

King *v.* Mabry and Henry.

3. SAME. *Boundary lines. Acquiescence.* Long claim of a certain line openly by a party, and acquiescence, in this case from twenty-five to forty years, by adjoining land owners, will fix the boundary at the line thus practically located, and enable a party having title to the land thus claimed by himself and those under whom he holds, to sustain a bill to enjoin a trespasser, and protect himself from any one not having superior title.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. O. P. TEMPLE, Ch.

HENDERSON & JOUROLMON for complainants.

W. M. BAXTER for defendants.

FREEMAN, J., delivered the opinion of the court.

The original bill by King is filed, claiming to be seized in fee of the tract of land in controversy, as described in a certain lease to his tenant, Clifton, and that he had been in exclusive possession of the same by himself and tenant since about the first of March, 1874, up to filing his bill, November 29, 1875. He claims to have enclosed a portion of the land and put the same in cultivation, and that while so in possession and his tenant was preparing to build a house to live in on the land, Mabry, the tenant and agent of Henry, forbid him doing more work on the land, and has continued to commit trespasses on the same, by removing the fence, and cutting timber, and attempting to enclose the land, so as to oust complainant of his assumed possession.

The prayer of the bill is to enjoin Mabry and Henry from disturbing complainant's possession, that he and his tenant be quieted in their possession, and the title settled as between the parties.

The Bill is either an ejectment bill, relying on the superior title alleged by complainant, or must stand as in the nature of an action of trespass, seeking to restrain Henry or his tenant from disturbing the possession of complainant.

It is not necessary, and we will not do so, to go into a review of the chain of title from the original grantor under which complainant claims the land, to show from this record, that he has failed to make out such a connected and continuous title to the land, as would sustain an action of ejectment, or entitle the complainant to recover on the strength of his title. We do not understand his learned counsel very earnestly to insist on this, and if it was insisted on it could not be maintained on the papers purporting to make the title as shown. We may dismiss this aspect of the case by saying, complainant entirely fails to make out his claim of seizin in fee of the premises in dispute.

We think it equally clear, that he has failed to make out his claim of exclusive possession, or any claim whatever of being *bona fide* in possession and occupation of the land. There is, as far as we can see, no proof in the record directed to sustain this allegation of the bill—no witnesses even being interrogated on this subject.

The complainant, we suppose, has expected to meet this, by what is a most strained construction of defendant's answer and cross-bill, in which he might seem to admit possession, by the use of the word "oust" complainant from the land. When taken in its connection and the whole answer looked to, it only amounts to this: Respondent most positively denies the fact of possession of the land, as complainant claims in his bill, and says the allegations are false, to use the strong language of the answer. He then asserts in equally positive terms, that he and those under whom he claims are seized of the land in fee, and have had the *exclusive* adverse possession of it for more than forty years under claim of title.

It is true he goes on to say, substantially, in reply to King's claim of possesson, that he had clandestinely cleared up about ten feet square, and sowed it in lettuce and mustard, leaving it to grow without cultivation. But this effort to obtain possession, respondent says, was treated as a joke. This, he says, was all the possession King ever had of the land until he leased it to Clifton, which lease bears date September 15, 1875. It is admitted that Clifton, the tenant, trespassed on the land, and prepared to cultivate some of it, and to build a house on it. Then he ordered his tenant to extend his own fence so as to include the lettuce bed, and removed the fence, etc.

Taking all this, it certainly falls short of admitting that complainant was ever in fact in possession of the land, and cannot fairly be construed into such an admission—most certainly the respondent did not intend

to contradict by this statement his positive denial of such possession—and only intended and fairly does admit the possession by the mustard and lettuce patch, and a trespass by clearing up land, and preparation for building a house, which was frustrated by the extension of his own fences so as to include the land attempted to be cleared, and intended to be occupied by cultivation.

In this view, which is the only fair construction of the record, complainant would have no standing in court, even as against a trespasser, for in such case, he must have the actual possession of the land, or be prepared to show a legal title, giving constructive possession. *Snoddy* v. *Kreutch*, 3 Head, 303.

It can hardly be necessary to cite authorities to show that such an occupation of a tract of land, as is admitted by respondent, a clandestine plant bed of ten feet square in the woods, whether inclosed or not by fence, could not be held such as would give the party a legal possession of the land. To be possessed of land the occupation must be real, not illusory—and evidenced by such public acts of ownership, as a man would usually exercise over such property, as enclosing a substantial portion of it, or erection of other improvements upon it, showing an intention to use it as owner, in such way as the character of the land was susceptible of. In the language of the Supreme Court of North Carolina, cited in *West* v. *Lanier*, 9 Hum., 771: "Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits of which it is sus-

ceptible, such acts so repeated, or we may add, continuous, as to show they were done in the character of owner and not as an occasional trespasser." No such state of things can be predicated of so insignificant a fact as sowing a lettuce bed on a spot of ground in the woods, ten feet square, and this is as much as the case before us shows.

In any aspect of the case, the complainant fails to make out title to relief, and the decree of the Chancellor must be reversed, and his bill dismissed with costs.

The respondent, however, has filed his answer as a cross-bill, and seeks active relief on that, asking that complainant's claim be declared a cloud on his title, and his trespasses or threatened disturbances be enjoined.

The respondent to this cross-bill has waived objection to the jurisdiction in the Chancery Court, and by denying the allegations of complainant, has put him to the proof of his case. In this aspect of the case is found the most difficulty, and that to which we have given the most earnest attention.

The complainant in the cross-bill must show either a title, as was required of complainant in the original bill, or that he had actual, real, and *bona fide* possession of the land in dispute. As to the latter, we need but say, that he has not shown the actual possession of the land in contest, as it is timber land, unenclosed, and complainant and those under whom he claims have only used it by cutting timber on it. It is true there is a farm on the land, west of where

complainant in the original bill insists the true line of Henry's land is, which has been cultivated, at least part if not all of it, for many years. But the claim of defendant, as shown by the lease to his tenant, is only to the fence enclosing this farm.

Complainant must then show title, and consequently a constructive possession, entitling him to relief against the trespasses of the claimant, or he fails. We will briefly state the conclusion we reach as to the facts on this aspect of the case, without going into a detailed review of the statements of the testimony by which these conclusions are sustained. Suffice it to say, that we have carefully examined all the testimony, and feel no doubt of the correctness of our conclusions.

We think it can hardly be doubted, that by the title papers, and the calls on their face as to courses and distances, and possibly for timber or natural objects, the true north and south line of the original White and Cosby grant would be where complainant claims it to be, and would not include the land in dispute, as claimed by King.

To meet this, however, the complainant presents by a large preponderance of the proof, in fact with no direct contradiction that meets it, the fact, that the parties under whom he claims, have claimed the north and south line to be where he now insists it is, that is, the extreme western line, as shown on the plats furnished us, for upwards of forty years. That such has been recognized and asserted as the western or north and south line of the White and Cosby tract, we think is proven by a large preponderance of the testimony.

The proof on this aspect of the case is found, not only in the fact of the claim of the Odells, under whom Henry has his title, and the use of the land up to or nearly so, to the line, but has been conceded by all the land owners who own land immediately adjoining the land in controversy. Cox and his heirs, who held a portion of the White and Cosby grant south of it, conceded it beyond all question, and claim up to the assumed line of the Odell occupation and claim, and recognize, and have done so for many years, the north and south line, with the Pine Knot and Rock corner, as the western boundary of the White and Cosby grant.

The owners of land, known as the Givens grant, lying immediately west of the line mentioned, are shown to have some of them called for the line, and all to have recognized it as the true line. It is true the deeds of the parties who own lands immediately west of the land in dispute, are not found in the record—but the fact is proven without objection, (if any could have been sustained) that they did recognize this Pine Knot and Rock line, as the north and south line of the Cosby grant. Then William Walker, who owns the land east of that line, and north of the Odell claim, the disputed land, swears the south-west corner of his land is the rock corner, and proves he has known that as the line, and it has so been recognized ever since he can remember. In this he is corroborated by Swan, who owns the land along and west of the line, and a number of other witnesses.

So we have the question presented, as to what is

the legal result of this long recognition of this line by the contiguous owners of the lands, in connection with the equally long and continuous claim of the Odells to the same, as their boundary, upon the rights of a mere trespasser, as King must be treated. Can the parties owning contiguous lands, in connection with a party claiming the land adjoining to them, by continuous and uninterrupted claim and recognition for so long a time, by practical location so establish and fix a line as their boundary, as that a trespasser with no title shall be bound by it, and not be permitted to say in his favor, that it is not the line or boundary of the land of the parties thus acting? This is the real question presented in this aspect of this case.

It has long been settled in our law, that the line or boundary of land may be shown or identified, by acts and admissions of the party owning the land, clearly and satisfactorily made out, and understandingly made; and even hearsay testimony of the statement of such parties, as well as general reputation in the neighborhood that a particular line or tree, even though not the one called for as a corner, is receivable for this purpose. *Davis* v. *Jones*, 3 Head, 603; *Polk* v. *Robertson*, 1 Tenn. R., 456; *Holland* v. *Overton*, 4 Yer., 482.

It is also settled that parties owning adjoining lands, where there is no certain and established line known to them, may by consent establish a boundary or line between themselves, and this will be valid and binding between themselves. *Lewallen* v. *Overton*, 9 Hum., Cooper's Ed., 75 *Rogers* v. *White*, 1 Sneed, 79; *Davis*

v. *Jones*, 3 Head, 603. Such a line so established is called a conventional line. It is also settled by the above and many authorities, that such an agreement as to the line may be shown by long acquiescence of the parties concerned, and its repeated recognition of the acts and declaration of the parties.

Conceding these principles, we think it follows inevitably, that a mere trespasser, and certainly no one, unless it may be a third party with superior title, could be allowed to intervene, and overturn what had been thus settled by the parties immediately concerned. As to such a party at least, having no title, the state of things thus agreed on must be held to be the true line, and he, as showing no right, must be bound by it.

It is proper here to say, that it is beyond all question, that Henry when he purchased this land some years before this contest commenced, was shown the lines by Odell, under whom he claims, and had this north and south line pointed out to him distinctly as the boundary of the land which he was about to purchase, and that he certainly in good faith so purchased, with no suspicion of any contrary state of things. The long claim and recognition of the adjoining land owners, acquiescing in this line, and their continued acquiescence up to the present time would, it seems, well warrant him in the claim he makes. Surely they are estopped, or would be on the facts, from interfering with his land so purchased. It is certain a mere trespasser or party without title, could in no aspect of the case stand in better condition than they would.

Without specifically answering the ingenious arguments of counsel as to other features of the case, we content ourselves by saying, they have been fully considered, and do not in any way, as we think, militate against the conclusion we have reached.

The result is, the original bill must be dismissed, and complainant in the cross-bill entitled to a decree quieting his possession, and enjoining King from interfering with the same. King will pay all costs.

Judge TURNEY being incompetent from relationship, took no part in the decision of this case.

THOS. B. MCCAMY *et als. v.* D. M. KEY *et als.*

1. CHANCERY PRACTICE AND PLEADING. *Enforcement of attorney's lien. Administrator not a necessary party.* An administrator is not a necessary party to a bill filed by an attorney to enforce a specific lien on land for professional services.
2. SAME. *Same. Non-resident. Affidavit.* A bill to enforce such lien against a non-resident is not required to be sworn to. The affidavit as to the non-residence of defendant may be before the master at rules.

FROM HAMILTON.

Appeal in error from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

N. BURT and E. M. DODSON for complainants.

KEY & RICHMOND for defendants

McFARLAND, J., delivered the opinion of the court.

This bill was filed July 19, 1876, alleging in substance as follows: That complainants are the heirs of S. R. McCamy, who died in the year 1874, in the State of Georgia, where he resided, and where complainants have since resided. That he was the owner of a certain lot in Chattanooga, in this State; that on the 18th of December, 1874, D. M. Key, S. A. Key and M. H. Clift filed their bill in the chancery court at Chattanooga against complainants, alleging that said S. R. McCamy was indebted to them for professional services in an action of ejectment in the circuit court of Hamilton county, and in the Supreme Court at Knoxville, in the case of Calloway's heirs against said McCamy, in which there was a recovery in favor of said McCamy of the lot in question, the amount of their fees being specified in their bill, and their bill further averring that the circuit court, upon the termination of the cause in 1873, declared a lien in their favor upon the lot for their reasonable fees. That said bill prayed for an order of publication, the appointment of a guardian *ad litem* for such of the complainants as were minors, and a decree for the sale of the lot in bar of the equity of redemption to satisfy their demands. That said bill was not sworn to, "no affidavit being attached to the proceedings." Nevertheless, publication was made against complainants as non-residents. E. M. Dodson was appointed guardian

ad litem for the minors who answered, but there was no appearance by the adults, a decree *pro confesso* being entered against them. Proof was taken and a decree in favor of the complainants in the cause, and the lot sold, and purchased by J. H. and C. W. Coker for $590, its real value being $2,000. It is charged that the decree is void, first, because there was no administration upon the estate of said S. R. McCamy, that the lien was for no stipulated sum, and no proof of lien. Second, because the bill was not sworn to, and various reasons are then set forth why this defect was fatal to the proceeding. The proceedings in said cause are referred to as if fully set out. Said Cokers have for some time been in possession of the lot. That they had also purchased said lot under execution sale for costs in said circuit court for a mere nominal sum, and had taken a sheriff's deed, which, it is charged, was void because the sale was made after the return day of the execution.

The bill then further charges that on the 16th of March, 1874, V. A. Gaskill filed in the same court his original and attachment bill against said lot and Samuel R. McCamy in his lifetime to collect an alleged indebtedness. The cause was revived against complainants, a special administrator appointed, the lot sold and purchased by C. R. Gaskill, and title vested. At this sale the lot only brought $300, on account of the alleged title of the Cokers, and it was hoped that the matter between V. A. Gaskill and the Cokers would be compromised, said Gaskill having obtained an opening of the biddings and advanced upon the

bid of the Cokers; this, however, was erroneously done at a special term of the court instead of at the regular term at which the sale to the Cokers was confirmed. Under the circumstances C. R. Gaskill admits that in equity he holds as trustee for those entitled to the lot or proceeds after being reimbursed. The prayer is that the proceeding under the bill of D. M. Key and others be declared void, the title of the Cokers a cloud upon complainant's title; that C. R. Gaskill be declared a trustee, and the lot sold for the payment of the debts of S. R. McCamy, and for distribution, with an account of rents and taxes. A demurrer filed in behalf of the complainants in the first named cause, and the Cokers was sustained and the bill dismissed.

It will be observed that there are really but two grounds of attachment upon the proceedings in the first named case of D. M. Key *et als.*, namely: First, that there was no administrator upon the estate of S. R. McCamy; and second, that the bill was not sworn to. As to the first ground, it was not a bill to administer the estate of a non-resident in the chancery court under our statutes, but a bill to enforce a specific lien upon certain real estate. The lien claimed has been recognized and enforced by this court, that is a lien in favor of the attorney upon the lands recovered for his client. *Hunt* v. *McClannahan*, 1 Heis., 503. Such lien being specific and fixed, must be regarded as in the nature of a mortgage, and inasmuch as the administrator of a mortgagee is not a necessary party to a bill to foreclose (Sto. Eq. Pl., sec. 175),

it would follow that an administrator in this case was not a necessary party. Much more must this be so when, as in this case, the domicil of the mortgagor or owner, and the general administration of his estate was in another State, and it not being shown that there were any personal assets or administration in this State, or any relief asked except against the specific property, upon which the lien was claimed. Again, if it were even conceded to have been error to proceed without an administration, it does not follow that the proceeding was void.

Upon the second point, the sections of the Code referred to in relation to the sale of property of persons under disability have no application to a case of this character. There is no positive requirement that a bill of this character should be sworn to. To dispense with personal service of process, however, publication should be made, and to authorize this the fact of non-residence should be stated under oath in the bill, or separate affidavit. The order of publication, however may be made, and in fact should be made, by the master at rules, and the affidavit of non-residence could well be made before him, and the absence of such an affidavit from the record would not render the entire proceedings void, especially where, as in the present bill, it is admitted that the names and residence of the parties were correctly stated, and that the publication was in fact made, and where the justice and merit of the claim is not denied.

It may be conceded that the case was one where the judgment *pro confesso* against the non-resident only

made an issue, and the complainants were required in addition to make out their case by proof, but we cannot in this proceeding look into the former case to see if it was well proven. Nor need we inquire whether the complainants, under the savings of our statutes in favor of non-residents, might not have had relief by coming in within the time prescribed and asking leave to defend in the original cause. They did not see proper to take this course.

The demurrer was properly sustained, and the decree will be affirmed with costs.

8L 252
11L 258

J. G. M. Ramsey *v.* O. P. Temple and M. L. Patterson.

1. Chancery Practice and Pleading. *Exhibits.* The practice of making records in other cases exhibits to a bill will not be allowed. If the record of former cases contain any material fact it should be stated.

2. Same. *Act of* 1877, *ch.* 97, *construed. Unliquidated damages.* If the act of 1877, ch. 97, extending the jurisdiction of the chancery court to all civil causes "except in injuries to persons, property or character," involving unliquidated damages, be constitutional, it must be strictly construed. It is, therefore, held that a bill in equity to recover damages of an attorney for ordering an execution held up whereby the amount of the judgment was lost, cannot be maintained upon demurrer that the remedy was at law.

2. SAME. *Same. Statute of limitation.* If such a bill could be maintained, the statute of limitation of six years would bar a recovery in this case.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. A. CALDWELL, Sp. Ch.

CORNICK & CORNICK for complainant.

ANDREWS, HENDERSON & JOUROLMON and LOGAN & LUCKEY for defendants.

MCFARLAND, J., delivered the opinion of the court.

The bill contains the following in substance, to-wit: That on the 4th of March, 1858, Brownlow and Ross filed their original bill in the chancery court at Knoxville in behalf of themselves and other creditors of the Bank of East Tennessee, to hold the complainants, Ramsey and Thos. C. Lyon, liable as trustees under an assignment by said bank and William M. Churchwell. That in the year 1858 the defendant, Temple, under an engagement previously made, became one of the counsel of Lyon and Ramsey, and acted as such, and that he has never, directly or impliedly, been discharged. In the year 1863 Samuel Bowman and Cynthia White each filed separate attachmemt bills in the same court against complainant Ramsey, and attached and sold his property, leaving a large surplus of funds after satisfying their demands. In the year 1864 the defendants, Temple and C. F. Trigg, filed their attachment bill against Ramsey to secure fees claimed by them for professional services

in the first named case, and in the course of the proceedings the court acquired jurisdiction over certain money belonging to complainant Ramsey—it is to be inferred (though not stated) the surplus arising under the bills of Bowman and White. In the progress of the first named case of Brownlow and Ross, but after the attachment above mentioned, said Brownlow and Ross filed an amended bill attaching a considerable fund belonging to complainant Ramsey, and the same being under the control of the court, it was loaned out by order of the court, in the language of the bill, "as funds on which Brownlow and Ross had acquired a lien, not as funds on a part of which Temple and Trigg had acquired a prior lien by their attachment." $1,219.48 of this money was, on the 11th of August, 1866, loaned to J. A. Mabry, who gave his note with G. W. Mabry as surety. Judgment was rendered on this note for $1,572.2 in favor of the defendant Patterson as clerk and master, on the 10th of June, 1871, and execution awarded but none ever issued. That complainant is informed that in July, 1871, the defendant, Patterson, as clerk and master, prepared an execution on said judgment, and had it ready to deliver to the sheriff, but defendant Temple directed him not to hand it out, and none was issued. That if an execution had been issued in the time prescribed by law, the full amount of said judgment could have been collected; that J. A. and G. W. Mabry have been insolvent since the year 1872. That in the first named case of Brownlow and Ross the Supreme Court decided, at its fall term, 1877, that the monies above

mentioned as the individual funds of complainant Ramsey were not liable to the claim of Brownlow and Ross, or to counsel fees relative to said trusteeship, and dismissed the bill as to Brownlow and Ross, and remanded the cause to collect the fund for complainant Ramsey. Since that time complainant expressly charges the Mabrys have been wholly insolvent.

During the time from the levy of said attachment until the decision of the Supreme Court as above mentioned, complainant was allowed no control over the fund, and when he applied to borrow portions of it he was in one instance required to give a higher rate of interest than was required of others. Complainant was very old, and was ignorant of what had been done until the decree of the Supreme Court, and never assented for execution to be suspended. No part of said fund has ever been paid.

Complainant asks leave to refer to the records, decrees, orders and all papers on file, and to the execution docket of this court, so far as the same is pertinent in said four cases of Trigg and Temple, Samuel Bowman, Cynthia S. White, and Brownlow and Ross and to the Supreme Court decrees in said last named cause, as exhibits to this bill, and as parts hereof, but not to be copied. The prayer is for a decree against Temple and Patterson for the amount of the Mabry debt. Various causes of demurrer were assigned and overruled, and an appeal allowed to the defendants.

Under the last clause of the bill above referred to, attempting to make the records of four other causes

exhibits to the bill, we have been furnished with voluminous transcripts of said causes from the files of this court. This practice cannot be sanctioned. The pleadings should state the facts relied upon in a succinct and orderly manner, without unnecessary prolixity or detail, and if the records of former causes contained any material fact it should be so stated, but it cannot be allowed that in this mode voluminous records in other causes may be referred to as exhibits so as to give the complainants the benefit of having stated in his bill every fact appearing in these records. The power of the court to strike out or disregard such prolixity is ample. See sec. 4316 of the Code. It has not been shown that these records contain any thing very important to a hearing of this cause upon demurrer, but if it were we would not look to them. Several causes of demurrer have been assigned, but we will only notice such of them as may be necessary to a determination of the case. In the first place it would seem manifest that both defendants ought not to be held liable for the default. If Temple was authorized as solicitor to control the issuance of the execution, then as the bill charges that he ordered the defendant, Patterson, not to issue it, the latter would be bound to obey the instructions, and would not be liable in any event, and the language of the bill already implies that Temple acted in giving this order as complainants solicitor. On the other hand, if he was not so acting or authorized to act as solicitor, then his orders was that of an unauthorized party, which no one would be bound to obey, and

consequently an act that could injure no one, and to which no liability would attach. In this view Patterson alone would be liable.

Passing this, however, we think there are two grounds upon which the demurrer should be sustained without reference to others. First, the jurisdiction of the court, and second, the statute of limitations. It will not be denied that, independent of the act of 1877, ch. 97, a demurrer to the jurisdiction in this case would have been fatal. That act extends the jurisdiction of the chancery court over all civil causes "except in injuries to persons, property or character, involving unliquidated damages." We are not to be understood as deciding the validity of this act in any respect, as serious objections have been made to it in view of the distinctive jurisdictions of our different courts, defined by the Constitution, but for the argument assuming it to be constitutional, we hold that it does not extend the jurisdiction of the chancery court to a case like this. In view of the long and well settled terms of distinction between causes properly recognizable in the two courts, and the practical inconvenience of vesting the chancery courts with jurisdiction over causes for the exercise of which it is not well adapted, we deem it proper to construe the above act strictly. The acts complained of are certainly in the nature of torts. An injury to "property" in its broadest sense would certainly include any tort injuring or destroying a chose in action, or rendering it valueless by defeating and obstructing the plaintiff in its collection.

From the very nature of the acts complained of, the damages are unliquidated, and not fixed by contract. They may be greater or less according as the extent of the injury may be shown by proof; and the character of the question is not changed by the allegation that the injury complained of has resulted in the loss of the entire debt; this allegation does not render the damages in their nature liquidated or certain. We admit that this act might be construed otherwise, but for the reason stated we deem a strict construction proper. For the same and perhaps stronger reasons we see no answer to the statute of limitations. The wrongs complained of occurred more than six years before the bill was filed, and this being the longest time, the action was barred, unless there be some ground of exception.

This is not a bill to hold the solicitor liable as trustee. He is charged with a tortuous act—no fraud or concealment is charged—and we see no sufficient answer to this defense. It is true that it appears that by reason of the attachments the complainant has lost the right to have the fund paid to him since the date of their levy, and therefore he could not sue directly for the money; but if this be any answer to the statute, it defeats the present case, as the attachment of Temple and Trigg is still pending so far as the allegations of the bill are concerned. But we are inclined to hold that although the fund was attached, and may in the end be decreed to others, still the complainant has all the time had such an interest as would enable him to sue for any tort by which

the fund was lost, not for the purpose of having it paid to him, for it is still his property, although it may in the end go to the payment of debts due from the others. But this character of action he could as well have brought when the injury was committed as now, and having failed to do so for the full period of limitations, his action is barred. His ignorance of the facts cannot excuse him, as the law charges him with a knowledge of every thing appearing in the record of his cause, and he had at all times the right to control the conduct of the cause as to himself, and to overrule the action of his solicitor, and therefore the allegation that he was not allowed to exercise any control over the conduct of the cause is immaterial, as he had at all times the right to discharge his counsel when dissatisfied with his conduct.

The decree will be reversed and the demurrer sustained and bill dismissed.

8L 260
15L 592

REBECCA GETTYS *v.* JAMES GETTYS *et al.*

SISTER STATES. *Decree of divorce void. When.* Ordinarily the judgments and decrees of a sister State have full effect in this State, but in divorce cases either the husband or wife must be a *bona fide* resident of the State in which the proceedings are instituted, else a decree thus fraudulently obtained will be held null and void. Mere temporary residence will not confer jurisdiction.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. O. P. TEMPLE, Ch.

A. S. PROSSER and HOUK & GIBSON for complainant.

W. P. WASHBURN and LOGAN & LUCKEY for defendant.

DEADERICK, C. J., delivered the opinion of the court.

Rebecca and James Gettys were married in Pennsylvania in 1866. Previous to the marriage they entered into a contract in contemplation of marriage, she relinquishing all claim to his estate, real or personal, if she survived him, and he agreeing, in consideration thereof, to secure her an annuity of $300, after his death and during her life. They resided, from the time of their marriage, in the county of McMinn, Tennessee, where defendant James had property and carried on business, until, as she alleges, he proposed

she should remove to Knoxville and he would remain at Athens and visit her occasionally. In 1876 she filed a bill against him for divorce and alimony, on the ground of cruel treatment and abandonment. To this bill respondent James answered, denying her charges and alleging in a cross bill that his life was in danger from her, and asking a divorce from her. Both bills were dismissed, and James Gettys appealed, but did not prosecute his appeal in this court.

Mrs. Gettys filed another bill for divorce and alimony in the chancery court at Knoxville in January, 1878, alleging that she had obtained information that defendant James Gettys, in the fall of 1877, had gone to Utah Territory, taking his son with him as a witness, and there obtained, on the 8th of October, 1877, a decree of divorce, which is exhibited with her bill, and which she alleges shows inhuman conduct toward and treatment of her.

The decree purports to be rendered in the probate court of Salt Lake county, in the Territory of Utah, and it appears from the transcript, and an affidavit of complainant James Gettys, that proceedings were instituted in the Utah court August 25, 1877, and a final decree, declaring complainant had forfeited her rights under the marriage contract, for divorce rendered on the 8th of October next thereafter. It is alleged in Mrs. Gettys's bill that at the time the affidavit of defendant James bears date, "August 25, 1877," which purports to have been made and attested in Utah, the said James was at his home in Athens, McMinn county, and that he was absent in Utah but a few

weeks, went expressly to institute proceedings against his wife for divorce, and returned to his home when his object was accomplished, and that he was not a bona fide resident of Utah at the time said suit was instituted, but had his domicil in Tennessee, where his business was carried on during his temporary absence. The defendant filed a demurrer to the bill, relying in various forms upon the validity of the proceedings of the said probate court of Utah, by which the relation of husband and wife had been dissolved between complainant and defendant, and insisting she had no legal claim upon him as his wife. The Chancellor overruled the demurrer and allowed defendant Gettys to appeal.

It is true that the judgments and decrees of a sister State are entitled, ordinarily, to have full effect in the other States, but in order that the courts of any State shall have jurisdiction in divorce cases, either the husband or wife must be a bona fide resident of the State in which the proceeding is instituted, and if one of the parties, merely for the purpose of obtaining a divorce, goes to another State, not intending to make it his home, such temporary residence does not confer jurisdiction of the marriage relation. Any other rule, as affording facilities for unscrupulous parties to cheat the courts of their domicil of its rightful jurisdiction over this important relation, would be most demoralizing in its consequences. Numerous recent cases have arisen, and have been most carefully and elaborately considered by distinguished jurists, of divorces thus fraudulently obtained, and has been held

that they are absolutely null and void. 23 Am. R., 299; 27 Am. R., 145; 2 Am. R., 415; 12 Am. R., 260; 19 Am. R., 132; Cooley Con. Lim., 400.

Since this cause has been pending in this court James Gettys has died. His death has been suggested and admitted, and the cause has been revived. The Chancellor refused to order the defendant James Gettys, upon motion by complainant, to pay into court a reasonable allowance to complainant *pendente lite* for the maintenance of the complainant and for counsel fees. If such an order had been proper, before a reference, the complainant snbmitted to it, and no other question arising under the demurrer than that decided, and the incidental questions of *res adjudicata*, and the insufficiency of the allegations to maintain the claim to alimony, and the want of any new ground of divorce since the dismissal of former bill, we affirm the Chancellor's decree and remand the cause for further proceedings. Defendant Gettys's executors will pay the costs of this court.

J. B. TURLEY *v.* W. I. HORNSBY *et als.*

ACTION. *Suit against endorsers.* Suit against endorsers of a promissory note is a transitory action, and an endorser may be served with original summons in any county where he may be found, and a counterpart may be issued to another county to be served on other endorsers, but not on the maker of the note.

FROM KNOX.

Appeal in error from the Circuit Court of Knox county. E. T. HALL, J.

H. H. TAYLOR for Turley.

HOUK & GIBSON for Hornsby.

FREEEAN, J., delivered the opinion of the court.

This suit is brought in Knox county against parties to the note on which the action is based, and presents the following state of facts: W. B. Love was the maker of the note, payable to W. I. Hornsby, and it was successively endorsed by the other parties to plaintiff.

Love being the sole maker, comes and pleads that he was served with a counterpart summons sent from Knox county to the county of Roane, and that the original summons had not been served on any joint maker or drawer of the paper. This plea commences with the statement that defendant comes by attorney as well as in his own proper person, etc. It is con-

ceded to be good, unless, the objection is well taken that it should be pleaded in person under the rule held in the case of *Shelby and Collins* v. *Johnson and Burk*, 7 Hum., 505. We do not think this objection well taken, as the fact that it is stated by attorney as well as in proper person, would only be surplusage as to the first statement, and could not vitiate that which was otherwise good. Besides, under the law as it now stands, by which all formal objections to pleadings are abolished, this court is forbidden to reverse except for matter of substance, and all pleadings held good that in plain language state a substantial cause of action or defense, it may well be doubted if it is not certainly true whether such an objection would now be good in any case. The matter of the plea is good. The objection is merely to the form in which it is stated.

The other three defendants come and plead to the jurisdiction of the court that the sole maker of the note, Love, was not served with process or original summons in the county of Knox, but with a counterpart in Roane county, and the original summons served only on W. I. Hornsby in the said county of Knox, he being only an endorser of the paper, and all the endorsers were citizens of Anderson county. To this plea there was a demurrer, which claimed that plaintiff had the right to sue Hornsby as such endorser, and the other endorsers be served with counterparts. The demurrer was overruled, and the plaintiff refusing to reply, the suit was abated. It is proper to say a demurrer had been filed likewise to the first plea,

which was overruled. This plea was good, and the court erred in this part of his judgment.

The only question now made is, whether the last plea is good, conceding the matter of the first plea to be a defense for the maker. It is insisted this is a transitory action under sec. 2808 of the Code, and the right of action follows the person. That section, however, adds, unless otherwise provided.

It was held under the proviso of the act of 1820, providing that a counterpart might be issued to another county, when the suit is brought in a county where one of the defendants in fact resides, that when service had been had on a resident party in the county, but the suit dismissed as to him, the parties served with a counterpart could plead this in abatement, even after a plea in bar. 1 Sneed, 40, 41. It is now insisted that the language of this *proviso* is not carried into the Code, and the law remains as it was under the act of 1809, a party being liable to be sued either at law or in equity where he may be found, and a counterpart issued to any other county. The fact is that this proviso is not carried into the Code. See secs. 2821 and 2902, and sub. secs. Upon examination we find no provision of the Code meeting such a case as this. In order to the abatement of a suit, the party in a case like this must show a statute requiring it, the general rule being that in transitory actions, as contradistinguished from local, the suit is properly brought wherever service can be had on the person. If the suit is properly brought against the endorser Hornsby, then counterpart may

as well issue to any other county as to the endorsers, no law forbidding it.

The result is, that the demurrer was improperly overruled as to the last plea, and the judgment is reversed.

31 267
91 333

W. N. LITTLETON *v.* E. A. YOST.

1. SUPERSEDEAS. *Liability of securities on bond. New judgment. Lien of levy upon land.* Upon the dismissal of a writ of *supersedeas*, granted upon a petition to the circuit court to supersede and quash an execution from said court which had been levied upon petitioner's land, a judgment may be rendered against the petitioner and his security upon the *certiorari* and *supersedeas* bond, and also an order of sale of the land levied upon. The lien on the land acquired by the levy of the execution improperly superseded is still in force, and can be maintained notwithstanding the new judgment.

2. SAME. *Costs.* In this case the facts developed that a portion of the judgment had been paid, but inasmuch as the whole execution was superseded the petitioner was liable for costs.

FROM ROANE.

Appeal in error from the Circuit Court of Roane county. E. T. HALL, J.

W. B. STALEY for Littleton.

No counsel of record for Yost.

McFarland, J., delivered the opinion of the court.

This was a petition to the circuit court to supersede and quash an execution issued from said court and levied upon petitioner's land upon the ground that the judgment had been paid and satisfied in full, or if not in full that petitioner was entitled to further credits, satisfying the judgment except a small sum. Issues were submitted to a jury, who found that the judgment had been paid except the sum of $230.08. The execution having been issued for a larger sum, the court gave judgment against the petitioner and his security on the *certiorari* and *supersedeas* bond for said sum of $230.08 and the costs, and also awarded an order of sale to sell the land so levied upon to satisfy said sum.

The petitioner appeals, and his counsel assign two errors. First that the court erred in ordering a sale of the petitioner's land under the levy of the execution; and second, in adjudging the costs against the petitioner.

First, it is argued that the effect of the *certiorari* and *supersedeas* was to discharge the levy of the execution and restore the property to the petitioner, substituting the bond and security in the place of the property levied upon. To support this position we are referred to the case of *McCamey* v. *Lawson*, 3 Head, 256. That case decides that such is the effect of a *supersedeas* upon the levy of personal property,

but concedes that such is not the effect as to a levy upon land, and refers to the case of *Overton* v. *Perkins*, M. & Yer., 373, which was an injunction bill, and in which it was held that the lien of an execution was not lost by the suspension of the sale by an injunction afterward dismissed, and it is said in substance that in strictness the rule ought to apply to personalty, but as to personalty an exception had to be made from necessity, for otherwise the property would perish often, and be lost pending the litigation. See also 8 Yer., 460. Previous to the Code when the writs were, as in this case, as a substitute for the writs of *audita querella* the practice was not to render a new judgment on dismissal of the writs, but to proceed simply to execute the former judgment, and if the case came from a justice to award a *procedendo*. *Kincaid* v. *Travis*, 10 Yer., 252; *Jones* v. *Williams*, 2 Swan, 107, and other cases. But this was changed by the Code, and now the practice is well settled that in this character of case, as well as where the writs are used to obtain a new trial, upon a dismissal, a new judgment is rendered against the petitioner and surety for the amount improperly superseded. See 1 Head, 558, and other authorities collected in note to section 3137, T. & S.'s Code. The question would then be whether a lien on land acquired by levy of the execution improperly superseded could still be maintained and enforced, notwithstanding the new judgment. In cases of executions of justices of the peace, brought up by *certiorari* to be quashed, some practical difficulty might exist in giving a creditor both a new

judgment on the bond and also the benefit of the lien acquired by levy of the execution, but in cases like this, superseding an execution of the circuit court when the *supersedeas* is dismissed, no serious difficulty would be in the way of allowing the creditor both remedies, and we are of opinion that in such a case the lien of the execution is not lost, but that the creditor is entitled in addition to judgment on the bond.

The present case presents this difference, that the levy sought now to be enforced was under an execution claiming a balance of over $500, whereas in reality only $230.08 was due. The effect of the judgment, however, is simply to quash the execution as to the excess, but enforce it as to the remainder, and the judgment is therefore correct. The next question is as to the costs. It is argued that as petitioner was forced to take steps to obtain the credits on the execution to which he was entitled, and having actually obtained the credit and shown that the execution was being run for near $300 too much, that he was the successful party in the sense of sec. 3197 of the Code, which allows full costs to the successful party, except where otherwise provided.

On the other hand, the petitioner superseded the whole execution, claiming that it was all paid, instead of pointing out truly, as he should have done, the amount actually paid. Had he taken the latter course the result would have been a successful prosecution of the cause on his part, and he would have been en-

titled to costs. Having improperly superseded the whole sum, the judgment against him for costs is justified by section 3138 of the Code.

Judgment affirmed.

ISAAC A. HILL *v.* WM. STAPLES.

STAY OF EXECUTION. When a stay is entered by consent of plaintiff after the time within which the privilege is granted by statute to stay the issuance of execution has expired, it operates to prevent the issuance of execution on the judgment for eight months from the *time the stay was entered*, and not eight months from the rendition of the judgment.

FROM ROANE.

Appeal in error from the Circuit Court of Roane county. E. T. HALL, J.

W. B. STALEY for Hill.

No counsel of record for Staples.

DEADERICK, C. J., delivered the opinion of the court.

Staples recovered a judgment against Johnson, Hawkins and Young before a justice of the peace of Roane county. Execution thereon was issued against the above named parties and Hill as stayor, and Hill

filed his petition for writs of *certiorari* and *supersedeas*, which, on motion in the circuit court, was dismissed, and he has appealed in error to this court. The petition alleges that the judgment was rendered on the 20th of August, 1875, and that in the following spring he stayed it, and on the 7th of August, 1876, an execution was issued, upon which $10 was made out of Young's property, and on the 12th of September, 1876, an alias execution was issued and levied upon petitioner's property on the 10th of October, 1876. It then alleges that Young, who is first liable, had sufficient property to pay the debt, and petitioner insists, if liable at all, he is not liable until after the property of Johnson, Hawkins and Young is exhausted. He further insists that the execution was issued before the expiration of eight months from the time he became stayor, and prays that said execution so levied on his property be suspended.

The first ground upon which petitioner relies, that the property of those liable before him as between themselves, should be first exhausted, we have several times held, does not entitle him to the relief he seeks. Under our statutes it is provided that defendants are entitled to a stay of execution for eight months on all judgments before a justice of the peace on giving good security for debt, interest and costs within two days after the rendition of the judgment. Code, sec. 3059. A subsequent act provides that the security for the stay may, with the consent of the plaintiff, be received and entered by the justice at any time before the debt is paid. Sec. 3060.

This last act, it seems, was construed to apply only to cases in which no stay had been previously entered. 10 Hum., 272; 1 Head, 282. Such are the facts in this case. Taking the two sections together, we are of opinion that when stay is entered by consent of plaintiff after the time within which the privilege is granted by statute to stay the issuance of execution has expired, that it operates to prevent the issuance of execution on the judgment for eight months from the time such stay was entered, and not eight months from the rendition of the judgment.

The section last cited provides that security for the stay may, with the consent of plaintiff, be received at any time before the debt is paid, whether it be six, ten or twelve months, or more, after the date of judgment. The stay here referred to is the stay of execution authorized by the section first cited, and for the period of eight months. So, if the plaintiff consented thereto, the stay which the petitioner says was entered into in the spring of 1876 entitled all the defendants to said judgment to have the issuance of execution stayed for eight months after it was entered, and the petition alleges distinctly that the execution was issued within eight months after the execution was stayed by him.

The petitioner, however, does not allege that he became stayor with the consent of the plaintiff, and if it were an open question we would be inclined to hold that this was necessary. But the court has held, in construing the act of 1841–2, Code, sec. 3060, that when the stay has been entered after two days from

the rendition of the judgment, the consent of the plaintiff, in the absence of proof to the contrary, will be presumed. 10 Hum., 274; see also 3 Head, 627. Upon a motion to dismiss a petition, its averments must be taken as true. It appears, then, from the face of the petition, that an execution has been issued and levied upon petitioner's property within less than eight months after he became stayor on said judgment with the assent of plaintiff, and this being so, he has the right to protect himself against this unauthorized process and levy to have said execution suspended.

The judgment of the circuit court dismissing the petition on motion was erroneous, and must be reversed, and the cause remanded for further proceedings.

S. M. Clarke *v.* Montague & Case.

Taxes. *Privileges. Land sales.* The levy of a tax upon privileges in general terms by the county court does not embrace a tax upon land sales.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. Trewhitt, J.

WHEELER & MARSHALL for Clarke.

CLIFT & CLIFT for Montague & Case.

McFARLAND, J., delivered the opinion of the court.

This was an action of replevin brought by Montague and Case to recover possession of a deed of conveyance of certain real estate near Chattanooga, the execution of which they had acknowledged before Clarke as County Court Clerk of Hamilton county, but which he refused to return to them except upon the payment of a county tax. The facts were agreed upon, and the questions submitted are, first, whether the county court has the power to levy the tax in question, and second, if such power exists, was it exercised in this instance? Has the county court of Hamilton levied the tax claimed? The judgment of the circuit court was in favor of the plaintiffs below.

It seems to have been generally supposed that the county court has the power to levy the tax, but it is not easy to maintain the right upon an examination of our laws upon the subject. The argument against it is, to say the least it, difficult to meet, but the question is one of importance, and as we are of opinion that its decision is not imperative in this case, we decline to express an opinion in regard to it. In our view the other question is conclusive of the case.

The records of the county court of Hamilton do not show any action of that body in terms levying a tax upon land, sales, or any tax that can be under-

stood as specifically levying the tax claimed. The records show an annual levy of taxes upon property and polls, and then the following general terms are used: "Tax upon all privileges heretofore taxed same as State tax," or "taxes on all privileges to be equal to the State tax," or other similar expressions. Conceding for the argument that the county might have levied the tax claimed, the question is, has it done so? It cannot, we think, for a moment be maintained that it comes under the general levy upon property. The levying of taxes, whether by the Legislature or the county court, is a legislative act, and must give the subject of the taxes and the mode of assessment in such manner as to be understood and enforced, and the levying of tax upon property which must be according to its value, furnishes no criterion by which a tax of this character can be assessed or collected, and besides it is manifest that such was not the purpose. But no doubt the clerk acted upon the assumption that the assessment of a tax upon privileges equal to the State tax upon privileges made it his duty to collect the same tax for the county that the law made it his duty to collect for the State upon land sales—that the tax came under the general head of privileges. To this construction, however, there appears to be insuperable objections: First, the Code, in enumerating the sources of State revenue, specifies "polls," "property," "sales of land," "on the exercise of privilege," "on litigation," "on fines and forfeitures," thus showing that when the Legislature levies a tax of the character in question, it does not

levy it as a tax upon a privilege, but as a specific tax upon land sales, thus recognizing a clear distinction. In specifying the sources of county revenue, "privileges" are enumerated, but "land sales" are omitted. Code, sec. 482. And it is further provided that the privileges which the county court may tax are the same as the privileges taxed by the State, Code, sec. 483, showing that the county court is not at liberty to include anything under the head of "privileges" not so taxed by the State. And it seems logically to follow that as the State does not class land sales as privileges and tax them as such, the county court cannot do so, even if the purpose to do so was manifest. The county court has no power to create privileges.

It was held by this court in the case of *Schlier* v. *The State*, 3 Heis., 281, and also *Jenkins* v. *Erwin Clerk*, 8 Heis, 456, that the definition of the term privilege, as given by this court prior to the Constitution of 1870, was, in effect, adopted by the Constitution, and must be understood as having been used in that sense. That definition is "the exercise of an occupation or business which requires a license from some proper authority designated by a general law, and not open to all or any one without such license." What are privileges will be found designated by the Code, sec. 550, and the act of 1873, p. 180, and land sales are not included. It seems clear, therefore, that the levy of a tax upon privileges in general terms, cannot be held to embrace a tax upon land sales, it certainly would not in a legislative act,

and we do not see how a different rule can apply to the act of the county court.

Without, therefore, determining whether the county court had the power in question, we hold that it was not exercised and the judgment will be affirmed.

3L 278
6L 132
9L 175

ROSINA KUHN *v.* MAT. SPELLACY *et als.*, and J. F. SHIELDS *v.* MAT. SPELLACY *et al.*

REPLEVIN BOND. *Judgment thereon.* A replevin bond, conditioned in the sum of $2,000 "to produce the property, if demanded, in as good condition as it then was, and deliver it to the proper officer of the court," will be regarded as a bond in double the value of the property, conditioned to pay its value and interest in the event defendant be cast in the suit, and the proper judgment thereon is for the penalty of the bond, which may be satisfied by the delivery of the property or payment of its value.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

KEY & RICHMOND and R. M. BARTON for complainants.

P. A. BRAWNER for Defendants.

McFARLAND, J., delivered the opinion of the court.

On the 26th of October, 1876, Rosina Kuhn filed her attachment bill against M. Spellacy, and attached certain personal property, whereupon J. F. Shields executed his bond in the sum of $3,000, conditioned to deliver the property to the proper officer of the court when so ordered, and the property was by the sheriff surrendered to him.

On the 6th of January, 1877, said Shields filed his bill in the same court against said Spellacy and others, alleging that said property had been taken out of his possession by the connivance of Spellacy, and setting up also other claims against said Spellacy, and prayed for an attachment, which was issued and levied upon certain personal property (part of the same previously attached). Thereupon said Spellacy executed a replevin bond, with P. McNamara and D. Kirkpatrick as sureties, in the sum of $2,000, conditioned that said Spellacy should produce the property, if demanded in as good condition as it then was, and deliver it to the proper officer of the court. The causes were heard together, and a decree rendered in favor of Rosina Kuhn for the amount of her debt against Spellacy ($1,615.15) and costs, and also against Shields upon his aforesaid bond, he admitting in open court that he could not return the property. At the same time the Chancellor rendered a decree in favor of Shields upon his bill for a like sum against Spellacy, and against his sureties upon his replevin bond, which sum, if collected, to be applied to the decree

in favor of Mrs. Kuhn against Spellacy and Shields. It is provided that Spellacy and his sureties on the replevin bond may satisfy the decree against them by a return of the property attached within twenty days. The case is before us upon the writ of error of D. Kirkpatrick, one of the sureties upon the replevin bond of Spellacy. It is clear he cannot assign errors in the decrees against his principal, Spellacy. The latter having submitted to the decrees, they cannot be reviewed in this mode. We cannot, therefore, inquire whether the proper decree was rendered against Spellacy and Shields in the first case, or against Spellacy in the last case. The only question is whether, assuming the decrees against Spellacy to be correct, the proper decree was rendered upon the bond upon which Kirkpatrick was surety. The bond is not strictly a statutory bond, that is, it is not in terms, either in double the amount of the plaintiff's demand, conditioned to pay the same, or in double the value of the property attached conditioned to pay its value, in the event he be cast in the suit as provided by sec. 3509, but its condition being to account for the property, it should be regarded as falling under the latter class, that is a bond in double the value of the property attached, conditioned to pay its value and interest in the event the defendant be cast in the suit. The proper judgment on this bond, as prescribed by sec. 3514, was a judgment for the penalty of the bond, which may be satisfied by the delivery of the property or its value. The judgment rendered was for less than the penalty of the bond, and cannot be com-

plained of on this ground. It gives the defendant the right to satisfy the judgment by the return of the property, but does not in terms give him the right to satisfy it by paying the value of the property. In this last respect the judgment is complained of. There was nothing to show the value of the property—no inquiry or reference on this subject moved for. Spellacy or his surety would have the right to satisfy the judgment on the bond by a return of the property or its value. If the decree of the Chancellor had followed literally the statute, and given to the defendants the right to satisfy the judgment by a return of the property or its value, then if they desired to satisfy it by paying the value of the property, the sheriff would probably not be authorized to accept any other sum as the value of the property than the sum fixed by the clerk as its value in taking the bond. This would be *prima facie* its value, but not conclusive upon either party, as we have held. The bond in the present case does not in terms show what sum was fixed as the value of the property, it shows that it was taken in the sum of $2,000, being the amount agreed upon by complainant, and as we have seen the condition was to deliver the property, we think it may be fairly taken that by consent the property was valued at $1,000. Now as we have seen that the statute provides that the court may enter up judgment for the penalty of the bond, which may be satisfied by a return of the property or its value, the question arises whether the right to so satisfy the judgment does not accrue to the defendant by the

force of the statute itself without its being formally entered in the judgment? We should be inclined to so hold, that is, that this judgment might have been satisfied by the payment of $1,000 and interest as the value of the property. We do not hold that the defendant is precluded by this sum, but *prima facie* it is the amount. He might have moved for a reference to ascertain its value, and may still have this relief, but there was no necessity to appeal to this court to obtain this relief. The attention of the court below was not called to it.

The decree will be affirmed, and the defendant may have this reference if he desires it, but will pay the costs of this court.

On petition to rehear McFARLAND, J., delivered the following opinion:

It is insisted that the bond of Spellacy, with Kirkpatrick as surety, is not a statutory bond under sec. 3509 of the Code, and strictly it is not, but such bonds are, by sec. 3512, expressly made subject to the rules prescribed by secs. 773 and 774 of the Code, and the obligors are subject to the remedies given upon strictly statutory bonds. If the bond in question should be construed as a common law bond for the forthcoming of the property, the result would be that the property would be regarded as in *custodia legis*, not subject to other levies, and if its return become impossible by the act of God, the obligors would be released. *Mosely* v. *Baker*, 2 Sneed, 369; *Green* v. *Smith*, 4 Col. We are of opinion that the bond

should be regarded as standing in the place of the statutory bond, and subject to the same remedies, as this does not violate its terms and conditions. It is further evident that it was not intended as a forthcoming bond simply, as it shows that it was executed because the defendant Spellacy desired "to replevy the property." But in either event, whether it be regarded as a statutory or common law bond, it cannot be construed as a bond for the payment of the debt, as it contains no such conditions. This is not in conflict with the case of *Barry* v. *Frazier*, 10 Heis., 206, as the bond in that case was construed to be a bond in double the plaintiff's demand, conditioned to pay the same, and its terms justified this construction. The obligors of the bond, by its very terms, had the right to discharge it by returning the property in as good condition as it was at the time it was replevied, and to return in the place of the property its value with interest would be equally just to the complainant. This is the provision of the statute as to statutory bonds, and we think this bond is subject to the same rule. The difficulty of showing the value of the property, or the imperfect and indefinite terms of the levy ought not to operate in favor of one party more than the other.

The application to modify is refused.

F. J. PAINE *v.* W. A. HOSKINS *et al.* and W. A. HOSKINS *v.* F. J. PAINE.

EXECUTION. *When functus officio.* An execution issued by a Justice of the Peace and placed in the hands of an officer and upon which he has made endorsements, cannot be certified to a different county and execution issued thereon. When an execution is placed in the hands of an officer, it constitutes an order on him to execute it as therein commanded, and to return it to the office from which it issued, with his endorsement thereon, and it is then *functus officio.*

FROM RHEA.

Appeal from the Chancery Court at Washington. W. M. BRADFORD, Ch.

ALLEN for complainant.

BRIGHT and GASS for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The original bill in this case was filed to enforce the vendor's lien for purchase money. The answer and cross-bill by the vendee, admitted the purchase and amount of purchase money due, but insisted his vendor's title was defective, and he was compelled to buy in the paramount title of a third party, for which he paid $2,500, and prayed for an abatement to that amount of the unpaid purchase money.

The sale was made in December, 1873, the agent

and attorney of defendant Hoskins negotiating the same with complainant Paine.

Hoskins purchased an alleged title of Gass, for which he gave $2,500.

Complainant claims title to the undivided half interest, originally belonging to one Binyon, by deed from Binyon and wife to Henry and from Henry and wife to him—to the other half his title is not questioned.

On the other hand, it is alleged that before the deed to Henry by Binyon and wife, to-wit, in 1861, Binyon's interest in the land had been levied upon by a justice's execution, issued upon a certified execution from a justice's judgment in Hamilton county. That a constable of Rhea county had levied said execution upon the land and returned it; and thereupon the justice of Rhea county returned the two executions to the Circuit Court of Rhea county, by which court the land was condemned and sold, and Gass became the purchaser, in July, 1861.

Questions arising upon a subsequent tax sale and redemption of the land, have been argued before us, but we do not deem it necessary to discuss them.

The Chancellor gave a decree in favor of complainant Paine, and Hoskins has appealed.

The rights of the parties must turn upon the question whether Gass, of whom Hoskins purchased his title, had a title, in fact, superior to that of Paine.

The record declares that two judgments were rendered in 1860 by a justice of the peace of Hamilton against Binyon, one for $62, and one for $23, in favor

respectively of Spicer and Lewis—the first in April, and the other in June. And as precisely the same proceedings were had in each case, it will be sufficient in testing their validity and the validity of subsequent proceedings upon them, to confine our consideration to the one first named, in favor of Spicer.

Upon this judgment an execution was issued by Johnson, a justice of the peace of Hamilton county, on the 19th day of April, 1860, to R. G. Campbell, a deputy sheriff, and was endorsed by him as follows: "Came to hand same day issued, search made and no property of the defendants to be found in my county, this 19th April, 1860.

(Signed) R. G. Campbell, D. Sh'ff.

Appended to this is the certificate of the County Court clerk of Hamilton county, required by section 3073 of the Code, dated 21st April, 1860. Then follows an execution issued by a justice of the peace of Rhea county, reciting the foregoing facts, and dated 26th April, 1860, which was levied upon the land in controversy on 27th April, 1860, by a constable, as the property of said Binyon. In March, 1861, an order of condemnation was had in the Circuit Court and a *venditioni exponas* was issued. Upon which the sheriff endorsed the following: "Came to hand 18th April, 1861. Bid off by W. T. Gass for one dollar. Jo. Howard, Sh'ff."

The successor of the sheriff J. Howard, B. F. Holloway, on the 14th June, 1871, ten years after his purchase, made a deed to Gass for said land—and this constitutes his title.

The sheriff, by the order of sale, was directed to sell the land for cash, and it does not appear from his return whether this order was complied with, for it might have been "bid off," without being paid for. But we are of opinion that there was no authority to take to another county, the execution issued to the deputy sheriff of Hamilton county, and by him endorsed as before stated.

When an execution is issued from court, or by a justice, and *goes into the hands of an officer*, it constitutes an order upon him to execute it as therein commanded, and to return it to the court or justice by whom it was issued, with an endorsement, showing what he has done, in obedience to said writ.

The return of the execution consists of two things: 1. To take the paper back to the office from which it issued. 2. To show by endorsement and signature what has been done under it. These are imperative duties of the officer. If he fails in the performance of both, he subjects himself to heavy penalties. He had no right to make other disposition of the executions in this case, than such as the law obliged him to perform—nor have we any reason to suppose that he did so. On the contrary we infer, without however any distinct evidence, that having made his endorsement on the execution, he returned it to the justice who issued it, showing how he had executed the writ, and that the justice re-issued it for the purpose of its being taken to another county.

The officer having made return of the execution issued to him, as it was his duty to do, it had per-

formed its office, and could not again be issued for any purpose. Its proper place was with the warrant and other papers in the magistrate's office, where it would serve to show what steps had been taken on the judgment, and upon which an alias execution was the proper writ. If it is intended that an execution shall be used in another county as the foundation of an execution there, it should not go into the hands of an officer in the county in which it is issued, as in such case the law requires the officer to return the writ to the office from which it issued.

We therefore conclude that the executions in this case having served their purpose, were *functus officio*, incapable of being made the foundation of process in another county, and the sale of the land, if really made, communicated no title to the purchaser, Gass.

We hold, therefore, that the Chancellor's decree was correct and affirm it.

J. W. PYATT *v.* MARY B. GALLAHER *et al.*

1. PROCESSIONING ACT. *Notice.* In proceedings under the processioning act, all parties interested must have notice. It is therefore error to admit the proceedings as proof in an action of ejectment, where the widow of a deceased claimant gave notice, but the heirs had no notice.

2. EJECTMENT. *Description of the land.* It is error for the court to charge in an action of ejectment, that "the jury may correct errors in the calls of the declaration by the proof, in the same way that a grant may be corrected by reference to the plat and certificate." A plaintiff cannot sue for one tract of land, and upon proof, recover a different tract. The declaration must describe the land with substantial accuracy.

FROM ANDERSON.

Appeal in error from the Circuit Court of Anderson county. D. K. YOUNG, J.

HOUK & GIBSON for Pyatt.

HENDERSON & JOUROLMON for Gallaher.

DEADERICK, C. J., delivered the opinion of the court.

Mary B. Gallaher, widow, and the other defendants in error, heirs at law of Benjamin H. Gallaher, brought this action of ejectment against plaintiff in error. They had a verdict and judgment in their favor, from which Pyatt has appealed to this court.

His counsel insists that several errors were committed against him, in the progress of the trial, for which he asks a reversal of the judgment.

Pyatt *v.* Gallaher.

1. Under the act for processioning land, Code, sec. 2020, *et seq.*, Mary B. Gallaher, the widow of deceased, had procured a survey to be made of the lines of the tract descended to her husband's heirs, about which the dispute arose. The line was run and marked by the surveyor and his certificate was registered. These proceedings, or a certified copy, was offered in evidence on the trial to establish plaintiff's title, and over the objection of defendant admitted, and allowed to go before the jury.

The objection taken was, that the notice given was signed only by Mrs. Gallaher, the widow to whom no dower in the land had been assigned, and that no service of the notice was had.

None of the heirs-at-law of Benj. H. Gallaher were parties to said proceedings or in any way bound by them. The statute contemplates that the party who owns the land shall institute the proceedings.

In *Chowning & Payne* v. *Simmons*, 5 Hum., 299, it was held that such proceedings must be in strict conformity to the statute, and that to operate as an estoppel, all the parties must be mutually bound.

It is very clear that none of the heirs-at-law of said Benjamin, who are parties to this suit, were bound, and it is equally clear Pyatt is not, and it was error to admit said proceedings as evidence against him.

The Circuit Judge instructed the jury in relation to an apparent conflict, in the description of the land sued for, in the declaration and title paper, that "the jury may correct errors in the calls of the declaration, by the proof, in the same way that errors in

the grant may be corrected, by reference to the plat and certificate." His Honor afterwards said correctly, that "it is sufficient if the land be substantially described in the declaration."

The first proposition is erroneous, because the proof must correspond with the allegations of the declaration. A plaintiff cannot sue for one tract of land, and upon proof of ejectment from a different tract, recover.

But the description of a tract of land in a declaration in ejectment, need not necessarily be by metes and bounds—where it can be done, this is the better and safer mode of describing it. But if described with substantial accuracy, so that the sheriff, upon a general verdict for plaintiff, could give him possession, it will be sufficient.

Our statute requires that the land sued for, shall be described "with convenient certainty, by metes and bounds or other appropriate description." Code, section 3235.

Let the judgment be reversed.

3L 292
10L 557

R. H. SWAFFORD *et als.* *v.* S. H. FERGUSON *et als.*

CONTRACTS. *Minors. Void or voidable.* Whether contracts of infants are void or voidable, may be thus determined: "When the court can pronounce the contract to be to the infant's prejudice, it is void—when to his benefit, as for necessaries, it is good—and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant."

FROM BLEDSOE.

Appeal from the Chancery Court at Pikeville. W. M. BRADFORD, Ch.

THOS. & D. L. SNODGRASS for complainants.

J. T. R. SWAFFORD and SPEARS & SPEARS for defendants.

MCFARLAND, J., delivered the opinion of the court.

S. H. Ferguson purchased of David Cleage and M. M. Cleage his wife, seven lots in the town of Pikeville, at the price of $250—$50 of which sum he paid in hand and executed his notes with surety for the remainder. Said Cleage and wife, by the direction of Ferguson, executed a deed coveying the lots to Emily Ferguson, the wife of said S. H. Ferguson, and her heirs in fee simple. Said Emily Ferguson afterwards died intestate and without issue, leaving her brothers and sisters and two nieces her heirs at law.

Ferguson paid his notes for the purchase money of said lots, partly in the lifetime of his said wife, the remainder of about $100, after her death. After the death of Mrs. Ferguson, her brothers and sisters and one of her nieces, being all of her heirs except one, joined in a quit claim deed, conveying their title to the lots to said S. H. Ferguson. The conveyance was without consideration. The bargainors were all infants, under twenty-one years of age, except R. H. Swafford and Nancy A. Northup, the wife of S. B. Northup. The original bill was filed by R. H. Swafford and said infants, including Emma Swafford who did not join in the conveyance, by said R. H. Swafford their next friend, to have their deed declared void, and to recover their interest in the lots, with an account of rents. S. H. Ferguson and Northup and wife were made defendants.

S. H. Ferguson filed a cross-bill, in which he claims a resulting trust in the property in his favor, by reason of the fact that the purchase money was paid by him; or in the event this relief be denied him, he asks to be substituted to the vendor's lien for the purchase money paid by him. The Chancellor dismissed the bill as to all the complainants, except Emily Swafford, holding that the deed of the infants was only voidable at their election after obtaining their majority, and they being still infants at the filing of their bill, the next friend had no right to file the bill in their behalf. A decree was rendered in favor of Emily Swafford for her share of the property with an account of rents. The other complainants have

appealed. R. H. Swafford being of full age at the execution of the deed, cannot avoid its effect as to him. As to the infants, the question is different. According to the authorities, if the Chancellor's premises were correct, that is, if the deed was only voidable and not void, then his conclusion was correct, as in that event no one but the infant after attaining his majority can call the deed in question. It is generally said that the deed of an infant is voidable, but the rule, as stated by Judge Green in the case of *Wheaton* v. *East*, 5 Yer., 41, is as follows: "When the court can pronounce the contract to be to the infant's prejudice it is void—when to his benefit, as for necessaries, it is good—and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infants." This, Judge Green says, is the language of Lord Ch. J. Eyre, and was quoted with approbation by Judge Story, in 1 Mason, 82, and by Chancellor Kent, 2 Com., 193. Judge Green gives as an instance of a void contract, by an infant, his becoming surety for another, as in such case it can only be to his prejudice. The deed of the infant in the case of *Wheaton* v. *East*, was held voidable only at the election of the infant, as it was a sale and conveyance of land for a full price paid.

The same rule was approved in the case of *McGan* v. *Marshall*, 7 Hum., 121, and in *Scott* v. *Buchanan*, 11 Hum., 468. The deeds in both of these cases were held voidable only at the election of the infant after attaining majority. The first being a mortgage by which the infant secured credit, which the court

said might have been beneficial to him. The latter was a conveyance upon a consideration which enured to the benefit of the infant.

If the rule as settled by these authorities be correct, it must follow that the court should treat the deed of the infants in this case as void, as it was the conveyance by them of title to property which they clearly owned and which was of some value, without any consideration, and it was necessarily to their prejudice, and could not by possibility be otherwise.

It is entirely different from a sale for a consideration, which might be to their interest.

The conclusion of the Chancellor is therefore erroneous, and we think this is a sound rule to apply to conveyances obtained from infants without any consideration whatever.

There is nothing in the cross-bill of Ferguson—whatever may be his moral equity, he can have no relief growing out of the fact that he paid the purchase money. It was a settlement upon his wife, executed, so far as he was concerned, and cannot be retracted, and having secured no rights under the deed, he can have none. It is clear that he could not set up, as against his wife, either a resulting trust or claim for purchase money—the law would raise no such presumptions and make no such substitutions in his favor, and he can have no greater claim to relief against her heirs.

The decree will be reversed and a decree ordered for the infant complainats, with the costs of this court, and the cause remanded for an account of rents.

3L 296
116 217

R. M. BARTON, Jr., Assignee, etc. *v.* JOHN GEILER.

BANKRUPTCY. *Assignee may sue in State Courts.* An assignee in bankruptcy may sue in the State courts to recover the assets of the bankrupt. The State courts thereby assume no jurisdiction under the bankrupt act, but simply exercise their ordinary jurisdiction in suits between parties.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

R. M. BARTON for complainant.

N. BURT and LEWIS SHEPHERD for defendants.

DEADERICK, C. J., delivered the opinion of the court.

On the 29th August, 1876, the complainant, as assignee in bankruptcy of Jacob Kessler and Fred. Horman, filed his bill in the Chancery Court at Chattanooga, against the defendant, John Geiler.

The bill alleges that on the petition of creditors of said Kessler & Horman, partners, filed 17th March, 1876, they were regularly declared bankrupts, by the U. S. District Court at Knoxville, on the 8th day of April, 1876.

It is further alleged that on the 10th February, 1876, said firm made an assignment of their stock of goods to a trustee for the benefit of their creditors,

and on the 18th January, 1876, Jacob Kessler made a fraudulent conveyance of an interest of one half in a valuable house and lot in Chattanooga to defendant Geiler; that their conveyance was made with the intent to defraud other creditors, and to defeat the provisions of the bankrupt act, by giving an unauthorized preference to said Geiler, who had reason to believe said debtor was insolvent and knew that a fraud upon said act was intended.

Defendant answered the bill and denied that he had reason to believe said Kessler was insolvent or knew that he intended any fraud by the conveyance, etc.

The Chancellor decreed that the conveyance was fraudulent, and that said Kessler had a fourth instead of a half interest in said house, and directed its sale as prayed for, but refused an account of rents, and from this decree both parties have appealed to this court.

Although the defendant took no objection to the jurisdiction of the Chancery Court by plea or otherwise, his solicitor suggests that question for consideration and determination of this court, and cites authorities upon which he relies, to show that the Federal Courts have exclusive jurisdiction to administer the bankrupt law, and to avoid sales or forfeitures under it, and to recover property fraudulently tranferred by the bankrupt. And such seems to have been the view taken by the Supreme Court of Wisconsin in the case of *Bromley* v. *Goodrich et al.*, decided in January, 1876.

The Supreme Court of Missouri, in the October

previous, had on the contrary held, that a State court has jurisdiction of an action brought by an assignee to collect a debt due the bankrupt, and he may select his forum for this purpose, and that this right of the assignee to use the State courts as agencies for the collection of the assets of the bankrupt, does not affect the jurisdiction of the Federal Courts, as to the disbursement of the assets when collected.

In the case of *Chaflin* v. *Houssman*, assignee, 3 Otto, 131, where the assignee brought suit in a State court to recover a sum collected on a judgment by default, by Chaflin, with intent to give him a preference and in fraud of the bankrupt law, the U. S. Supreme Court held, that the assignee might bring such a suit in the State court.

There does not seem to be any sound reason why the agency of the State courts should not be used, in the collection of the assets of the bankrupt, for the purpose of aiding the Federal Courts in the administration and distribution of the bankrupt's estate. They assume no jurisdiction under the bankrupt act in so doing, but simply exercise their ordinary jurisdiction in suits between parties.

We are of opinion, therefore, that an assignee in bankruptcy may sue in the State courts, to recover the assets of the bankrupt, and that such suit in no way affects or interferes with the jurisdiction of the Federal Courts, in case of bankruptcy.

The next question is, do the provisions of the bankrupt act make the conveyance from Kessler to Geiler void?

To make the conveyance void, the following facts must concur:

1. The debtor making the transfer must be insolvent.

2. The conveyance must have been made with a view of giving a preference to the creditor.

3. In any event, the person receiving the conveyance must, at the time, have reasonable cause to believe the person making the conveyance to be insolvent, and

4. He must also know that such conveyance was in fraud of the provisions of the bankrupt act.

5. The conveyance must have been made within four, or (in this case of involuntary bankruptcy), two months before the filing of the petition, by or against the bankrupt.

It sufficiently appears from the record, that at the time of the conveyance to Geiler, Kessler was insolvent. But it does not appear that Kessler, at that time, was aware of the fact of his insolvency, otherwise than as the fact being so, one may be presumed to be aware of his own condition. At the time the conveyance was made, Jones, who was in the employ of the firm, says that he always understood they were well to do, and always promptly met their debts, and it was at his instance that the inventory was taken of their stock, which showed it was not sufficient to pay their debts, and he then advised they should make an assignment, which was immediately done. This was several weeks after the conveyance to Geiler. And Evans testifies that before the inventory was taken, Kessler insisted they had ample means to pay their

debts; and he and his partner had some disagreement, which made Horman desirous to sell his interest to Kessler. And Kessler testifies that he never knew he was unable to pay his debts until the evening before the assignment was made on taking an inventory of their assets, and had not then, nor before, nor after, any intention of taking the benefit of the bankrupt act, but made the assignment to pay his creditors as far as his assets would go, and then to pay the rest as he might be able. There is no testimony in the record to contradict these statements.

Geiler is an old German, speaking English very imperfectly, so that it was necessary in taking his deposition to employ an interpreter. Beside, he is afflicted with a disease of the spine, is very hard of hearing, and hardly competent to attend to his business. He denies having any reason to believe that Kessler was insolvent, or having any knowledge that Kessler's conveyance to him was in fraud of the bankrupt act. Kessler had for several years, five or six or more, lived in his family, and acted as his agent in transacting his business; had handled considerable sums of money, and no complaint seems to have been made of his want of fidelity. He, as both Geiler and himself state, had borrowed several sums of money of Geiler, who held his notes, one for $875, and one for $630, and the firm of Kessler & Horman owed him $560. This sum and about $200 due Chris. Horman, a brother of Fred., and former partner, were proved by them respectively, in the bankrupt case.

There is no evidence, aside from the fact of insol-

vency at the time of the conveyance to Geiler, of an intent to prefer. But at that time Kessler says he believed he was solvent, nor does it appear that others supposed that he was not.

Evans, who wrote the deed and did business for the firm, and Chris. Horman, a partner up to September, 1875, supposed them to be solvent; and Evans testifies that they had good credit and always paid their notes when due, up to the time of the assignment. When the conveyance was made to Geiler, Evans drew the deed, and proves that the two notes of Kessler were surrendered to him, and Geiler remarked that he would go and get the money to complete the payment, but Kessler remarked to him, wait awhile, we will go and have the deed recorded, etc.; that he saw no money paid. But Kessler and Geiler both swear it was paid on that day, 18th January, and Kessler said he paid part of it in a day or two afterwards to Chris. Horman on a note due him; and Chris. Horman proves that Kessler did pay him on the 19th or 20th of January, six or seven hundred dollars on a note he held on him. It is true Kessler lived in Geiler's family and his firm occupied Geiler's store house. But it is in evidence that the rent was regularly paid, and there is no evidence that Geiler had reasonable cause to believe Kessler was insolvent when he took the conveyance.

We think the evidence very clearly shows, that Geiler paid all of the $14,300 that the lots and improvements cost, except $2,325 that Kessler paid, and

that this sum was repaid him in his own notes and in cash by Geiler.

All the testimony was taken by complainant, and unless we reject the testimony of his own witnesses, we are unable to concur in the Chancellor's conclusion, that the sale and conveyance to Geiler was fraudulent in fact, and void under the bankrupt act.

The Chancellor's decree will be reversed and the bill dismissed.

3L 302
8L 395

JOSEPH RUOHS *v.* R. M. HOOKE & WIFE *et als.*

HOMESTEAD. *Fraudulent Conveyance.* A wife is entitled to a homestead out of lands fraudulently conveyed to her by the husband for the purpose of hindering and delaying his creditors.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

KEY & RICHMOND for complainant.

VANDYKE, COOKE & VANDYKE for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed by a creditor of R. M. Hooke, alleging a judgment of $500, in the Circuit Court of Hamilton county, execution and return of "*nulla bona*," and then among other things, that R. M. Hooke, in October, 1873, conveyed by deed to his wife, what is known as the "Star Fort Hill" property, a house and lot occupied by them as a home, situated in the city of Chattanooga, and that this conveyance was void as to creditors.

This conveyance purports on its face to be made for "love and affection," and is so charged in the bill. It appears, also, that this property had been conveyed previously by deed in trust to a trustee, with other property, to secure a debt due J. E. Raht, of $5,000. This conveyance, June 11th, 1873. It is then alleged that complainant was creditor of Hooke when the conveyance to his wife was made, "and that he was insolvent, or at least so much indebted as to greatly impair his ability to pay his debts by said conveyance." The deed of trust referred to, with others, is stated to be unexecuted.

The prayer of the bill is for an attachment of the equitable interest of said Hooke in the property, that an account be had of the debts due, the property sold, and liens be discharged created by deeds of trust, and residue applied to the satisfaction of complainant's debt. It is also especially prayed, that the aforesaid deed to the wife be set aside as fraudulent and void.

The Chancellor decreed the deed of October, 1873,

fraudulent in law and void, being made without consideration. He also denied the right of the wife to a homestead in said property.

From this decree the husband and wife appeal, in *forma pauperis*, to this court.

Two questions are presented. Was the deed fraudulent and void? And was the wife, under the facts of the case, entitled to a homestead?

The answer of respondents admit the conveyance to the wife, but say it was recited that it was made for love and affection, but in reality, the conveyance was in consideration of about $3,000, money belonging to the wife, which she let the husband have, "and which he used in business, and with which he designed to secure her a home; but respondent did not then expect that any one would question the same, and he was not particular to express the real consideration of the deed. He then goes on to deny that he was in failing circumstances, or indebted to complainant when the deed was made, and insisted that he had property outside of this conveyance to the wife, of more than three times the value of all his indebtedness.

We find, after examination of the facts in the record, that the conveyance to the wife must be held voluntary—and think it clear, that Hooke was not in condition to make such a conveyance. It is probably true, that upon his estimate of the value of his property in October, 1873, it might have paid his debts, and left a surplus; but we know that estimates of value of property at that period proved illusory in most cases, and the result in this case shows it was

certainly so. The whole property not covered by mortgage or liens seems to have been absorbed by debts before March, 1875, and the debts now to be enforced will, we suspect, scarcely be paid by its proceeds. The conveyance to the wife cannot be supported as against creditors.

It is insisted, however, that in any aspect of the case, the right of homestead shall be allowed, the wife not having joined in any deed conveying this right, in which she has been privily examined, as is required by our Code, sec. 2114.

It has been held by this court, in the case of *Cowan* v. *Johnson*, Com. Rept., Oct. 11th, 1876, that where the wife joined in a conveyance to a third party, and such party then conveyed to her, said conveyance having been fraudulent, she had lost the right of homestead.

Without discussing the correctness of that decision, resting as it does perhaps on an estoppel on her part, or it may be on the ground of active participation in attempted fraud by the wife, we distinguish this case from that, on the ground that the wife has not participated in any fraud. There is but fraud in law, growing out of a gift by the husband to the wife, which he was unable to make by reason of his indebtedness. The wife simply accepted the bounty, or did not dissent. On what principle it can be held that the homestead right secured by the Constitution of 1870 not only to the head of the family exempt from sale under legal process during his life, but which enures to the benefit of the widow and the children

during minority, is held to be forfeited in favor of the creditor, by a voluntary conveyance made to the wife, we are unable to see.

The conveyance made to the wife, is void as to creditors, and is set aside, as to the right of the creditor existent at the time of the conveyance—so that the creditor stands as if it did not exist. This is clear. But how the creditor stands any higher, or acquires an additional right by setting aside the conveyance, beyond what he had before it was made, it is difficult to see. Before the conveyance he could sell the property of his debtor, subject to the homestead—but the wife was entitled to the homestead, and it could not be sold by legal process. You set aside a conveyance to her, as voluntary, and by that legal process you sell the homestead, and deprive her of it, in the teeth of the Constitution and the law. It is thus alienated by legal process or proceeding, when the Constitution says, "nor shall said property be alienated without the joint consent of husband and wife, where that relation exists, and "that to be evidenced, under the statute made to carry out the constitutional provision, by conveyance duly executed as required by law for married women."

In the face of this we must hold it may and shall be subject to be sold by legal process, and be alienated without conveyance by the wife, executed as required by law for married women.

The husband makes a voluntary deed to the wife, which is void because he is indebted and therefore must be just before he is generous. His creditors

have prior claim protected by law, but that claim does not reach or attach to the homestead—on the contrary it is expressly excluded. You set aside the conveyance as against this creditor's right, and enforce the right he had before it was made—and lo, by some magic, that right is enlarged so that it embraces and swallows up the homestead. So that the creditor, so far from being injured, obtains a benefit he did not before have, and obtains a right not before enjoyed. How this can be done, or worked out, is what we are unable to see. The conveyance is void as to creditors, but good as against the homestead, so far as to defeat the right of the wife to it, and give the creditor the right to appropriate it to his debt, which right is not conveyed or stipulated for in the deed to her, nor bargained for by the creditor. We do not think this is sustained either by reason or authority.

We therefore hold, that this deed of gift to the wife, though voluntary and void as to creditors, does not defeat the homestead right, nor enlarge in any way the right of the creditors, as they existed before it was madde.

The decree will be modified to this extent. Costs of this court will be paid, one-half by complainant, the other by Hooke and wife.

Upon application to modify decree, FREEMAN, J., said:

The facts are complainant, a creditor of Hooke, filed this bill to enforce deed of trust to Warwick for the benefit of Raht. After the conveyance in trust

to Warwick, Hooke had conveyed the "Star Fort" property to his wife by voluntary conveyance. This conveyance was subject to the trust. The bill sought to enforce the trust, have the deed to the wife declared void as against the creditor, the property sold and appropriated first to the discharge of the debts under the trust, and balance appropriated to complainant's debt. Raht and the trustee were made parties, and answered, tendering a copy of the deed of trust as evidence of their rights, but this deed of trust, made by Hooke and wife, in which she releases her interest in the land, does not appear on the copy tendered to have been acknowledged by the wife. In fact, it seems to have been a copy from the register's book, as there is a certificate on it that the deed "with certificates" was filed in the office and registered. The question is, whether on this state of facts we should decree a homestead in favor of Mrs. Hooke against the right of Raht, she and her husband having set up claim to it in their answer, Raht and trustee not saying anything on the question, no issue being made as between them and Hooke and wife on this question.

We are of opinion that the only issue in this case was between complainant and the defendants, and no decree can be made precluding the rights of Raht or the trustee of the deed under which his interest is secured. That matter is outside of this case, and if the parties have a homestead right as against that conveyance, they may assert them in a proper proceeding for that purpose.

3L 309
14L 467
14L 474

EDWARD LAWSON v. THE STATE.

CRIMINAL LAW. *Perjury. Indictment.* An indictment for perjury is sufficient which sets out the court in which the alleged false oath was taken, that the oath was administered by a person authorized, and that describes the judicial proceedings in which the oath was taken and testimony given, and that the matter alleged to be false was material.

FROM JEFFERSON.

Application for writ of error to the Circuit Court of Jefferson county. J. G. ROSE, J.

The indictment in this case was as follows:

State of Tennessee, } Circuit Court, April Term, 1877.
County of Jefferson. }

The Grand Jurors for the State of Tennessee, having been duly summoned, elected, impanelled, sworn, and charged to inquire for the body of the county aforesaid, upon their oath aforesaid, present that Edward Lawson, late of said county, laborer, on the 10th day of December, eighteen hundred and seventy-six, in the State and county aforesaid, feloniously, willfully, maliciously, deliberately, absolutely and corruptly swore falsely to a certain matter as follows, before the Grand Jury of the Circuit Court then and there being held for the county and State aforesaid, by the Hon. James G. Rose, Judge of the second judicial circuit of the

State of Tennessee, duly elected by the qualified voters thereof, and commissioned by the Governor of said State, and the Grand Jury was then and there in session under the control and supervision of the said Hon. James G. Rose, wherein and before whom it became and was material to inquire whether or not any one within the limits of the county aforesaid had been guilty of selling whiskey without first having appeared before the County Court clerk and entering into bond and taking and subscribing to the oath, as the provisions of the act of assembly require, and the said Edward Lawson being then and there sworn by Ed. R. Hall, foreman of the said Grand Jury, under the direction and by the command of the said Judge, he, the said Ed. R. Hall, foreman as aforesaid, having lawful authority to administer oaths on the holy evangelists of Almighty God the truth to speak, the whole truth and nothing but the truth, before said Grand Jury, when, having first been sworn by Ed. R. Hall, foreman as aforesaid, the said Edward Lawson feloniously, willfully, deliberately, absolutely and corruptly swore then and there before the Grand Jury aforesaid, that he, the said Edward Lawson, had bought one pint of whiskey from one Fanny Chambers, and that he, the said Edward Lawson, had paid her, the said Fanny Chambers, fifty cents for said pint of whiskey, and which said swearing was material to the point under investigation by the said Grand Jury, and was knowingly, maliciously, feloniously, willfully, deliberately, absolutely and corruptly false, and the said Edward Lawson then and there well knew the same to

be false in point of fact when he deposed to it. And so the said Grand Jurors aforesaid, upon their oath aforesaid, do present and say that the said Edward Lawson, on the day and year last aforesaid, in the State and county aforesaid, in the manner and form aforesaid, and by the means of the false swearing aforesaid, was guilty of felonious, willful, deliberate, malicious, absolute and corrupt perjury, to the evil example of all like offenders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the Jurors aforesaid, upon their oath aforesaid, do further present, that Edward Lawson, on the 8th day of April, 1877, in the State and county aforesaid, feloniously, willfully, maliciously, deliberately, absolutely and corruptly swore falsely to a certain matter as follows: A certain lawsuit or trial, wherein the State of Tennessee was plaintiff and Fanny Chambers was defendant, was pending and came on for trial, and was tried at the April term, 1877, in the Circuit Court for the county of Jefferson aforesaid, before the Hon. James G. Rose, Judge, etc., for the second judicial circuit of the State of Tennessee, duly elected by the qualified voters thereof, and commissioned by the Governor of said State, and before a jury duly elected, impanelled and sworn to try the issue in said cause, and the said lawsuit or trial was within the jurisdiction of said Circuit Court, wherein and on the trial of said cause it became and was material to enquire whether or not the said Fanny Chambers had sold for a valuable consideration any whiskey, contrary to the

provisions of the act of assembly, and the said Edward Lawson being then and there sworn, on behalf of the plaintiff in said cause, by W. P. Hoskins, clerk of said Circuit Court, under the direction and by the command of the said Judge, he, the said W. P. Hoskins, having lawful authority to administer oaths, on the holy evangelists of Almighty God, the truth to speak, the whole truth and nothing but the truth, on said trial, when having first been so sworn, the said Edward Lawson feloniously, willfully, deliberately, absolutely and corruptly swore that he, the said Edward Lawson, had got a pint of whiskey from her, the said Fanny Chambers, but that he had not paid her, the said Fanny Chambers, therefor, nor did he promise to pay her for the same, which said swearing was material to the point at issue on said trial, and was knowingly, maliciously, feloniously, willfully, deliberately, absolutely and corruptly false, and the said Edward Lawson then and there well knew the same to be false in point of fact when he deposed to it. And so the Grand Jurors aforesaid, upon their oath aforesaid, do present and say that the said Edward Lawson, on the day and year last aforesaid, in the State and county aforesaid, in the manner and form as aforesaid, and by means of the false swearing, was guilty of felonious, willful, deliberate, malicious, absolute and corrupt perjury, to the evil example of all like offenders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

Jno. B. Meek,
District Attorney, *pro tem.*

KING, PARK and OWENS for Lawson.

ATTORNEY GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

Lawson was convicted of perjury and is now in the penitentiary, and has presented the record and prays for writ of error to reverse the judgment.

The indictment sufficiently sets out the court in which the alleged false oath was taken, and that defendant was sworn by an officer authorized to administer oaths, and describes the judicial proceeding in which the oath was taken and testimony given, and that the matter alleged to be false was material.

Defendant, as the indictment alleges, testified before the grand jury that he had bought a pint of whiskey of Fanny Chambers, who had no license to sell, whereupon she was presented and tried, and defendant on her trial swore he had not bought any whiskey from her, but she gave him some.

The indictment, with full and proper averments, charged and set out the oath taken before the grand jury and testimony given, and proceeds to negative the testimony in the following language: "and which said swearing was material to the point under investigation by the grand jury, and was knowingly, maliciously, feloniously, willfully, deliberately, absolutely and corruptly false, and the said Edward Lawson then and there well knew the same to be so false in point of fact when he deposed to it."

At the common law, the general averment that defendant swore falsely, would not be sufficient, it be-

ing deemed essential that the words of the false swearing should be expressly and in terms contradicted. 3 Am. Cr. L., sec. 259. But we have statutory enactments intended to simplify and abbreviate the prolixity of the common law form of indictments.

Experience has shown how difficult it is, in the hurry of the duties of his office, for the attorney-general to avoid mistakes, especially in drawing an indictment for perjury in the common law form. Our Code provides, sec. 5114, as to all indictments, that the facts constituting an offense, shall be charged in concise language, without prolixity or repetition.

And as to perjury, it specially provides that it is sufficient to give the substance of the controversy or matter in respect to which the offense was committed, and in what court or before whom the false oath was taken; and that the court or person before whom it was taken had authority to administer it, "with proper allegations of the falsity of the matter on which the perjury is assigned." Section 5130.

This, we think, has been all done "in ordinary and concise language," and as explicitly and intelligibly expresses a charge of perjury, as the most prolix and technical common law indictment could do.

And while we do not recommend a hasty departure from long used and approved forms, our experience satisfies us that cautious and well-considered changes which simplify, and at the same time preserve the substance of such forms, are subservient to the ends of justice. We think, therefore, the indictment in this case is a substantially good one, containing as it does

proper and distinct allegations of the falsity of the matter which is set out as constituting the false swearing.

It is argued that the evidence does not support the finding of the jury. Without discussing at length this proposition, we deem it sufficient to say, that we are satisfied with the correctness of the verdict and judgment, and the writ of error will be refused.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE . . . DECEMBER TERM, 1879.

JAMES H. AKIN *v.* JOHN T. BINGHAM *et als.*

PARTNERS. *Suit by. Injunction bond. Surety. Indemnity of surety. Agreement. Burden of proof.* One of two persons, late partners, who had united in a bill to enjoin the collection of a partnership debt, and in giving the injunction bond, procured the surety to the bond, and to indemnify him against any loss, agreed to transfer, and did afterward transfer, for his benefit, the balance due upon a note given to him by the surety for land, but subsequently authorized the surety to pay out of such balance a judgment against him as a prior encumbrance on the land, after which he became insolvent; the bill was dismissed, and the other partner paid the judgment rendered against them for the debt enjoined, and filed this bill to hold the surety liable for the indemnity. Held, that the transfer itself gave him no cause of action; that the burden of proof—the facts on which his equity rested being denied by the answer—is on him to show an agreement that the indemnity was to enure to his benefit; that representations of the co-partner and surety in the nature of expressions of opinion, not of contract, nor intended to influence his action except in the way of persuasion, would not entitle him to relief; and that the payment of the

alleged judgment, if made in good faith, would, probably, in any event, protect the surety, there being to that extent a failure of the original consideration of the note.

FROM MAURY.

Appeal from the Chancery Court at Columbia. WARD, Sp. Ch.

G. P. FRIERSON for complainant.

I. N. BARNETT for defendants.

COOPER, J., delivered the opinion of the court.

The complainant, James H. Akin, and N. W. Jones were partners in and prior to 1859, in which latter year the partnership was dissolved, Jones retaining most of the assets and agreeing to pay the debts. E. A. Hoge, one of their creditors, recovered judgments against them for about $600, on which executions were issued and levied on the personal effects of Jones. Thereupon a bill was filed in the name of Jones and Akin enjoining the collection of these judgments. The injunction bond bears date June 10, 1865, and is signed by both Jones and Akin as principals, and John T. Bingham as surety. Bingham bought a tract of land from Jones at the price of $9,000, for which he had given his note, but had made payments reducing the amount due to about $3,560. Before he would go upon the injunction bond there was an agreement between him and Jones that he was to be indemnified against the liability by means of this balance of debt. He had also become security on an-

other injunction bond given by Jones upon a bill filed against Irwin and Stockard. There was also still due from Jones to his vendor of the land a balance of debt of about $2,445. On the 17th of June, 1865, the parties undertook to reduce the agreement between them to writing in the following form. James S. Bingham, a brother of John T. Bingham, executed an instrument by which, after reciting that Jones held his brother's note for the land, and was indebted to his vendor for the same land as above, that Jones and James H. Akin had filed a bill in chancery to be relieved from the Hoge judgments, and Jones had also filed a bill to be relieved of a judgment in favor of Irwin and Stockard for $275, and John T. Bingham was the surety on the injunction bonds in these cases, and after further reciting that Jones had transferred to him $3,560 of the note of John T. Bingham, the said James S. Bingham bound himself to pay off the balance due to Jones's vendor, and in the event Jones was relieved of the judgments enjoined, or should satisfy the same, to repay Jones $1,125, with interest, being the amount of said note of John T. Bingham so transferred, beyond the amount due to Jones's vendor. At the same time, and as part of the same transaction, John T. Bingham signed an instrument stating that the agreement was made for his benefit "so far as the land purchased is concerned," acknowledging that he was bound by the provisions of the agreement, and took the land subject to the lien thereon in favor of Jones's vendor. Both of these instruments were acknowledged and registered, and on

the 26th of September, 1865, Jones gave an order on John T. Bingham to pay out of the balance of purchase money due him and transferred as above, a judgment against him recovered by one Pinkard, and on the 30th of April, 1866, Bingham paid the judgments accordingly. It seems that Pinkard claimed to have acquired a lien for the satisfaction of this judgment on the land sold by Jones to Bingham by virtue of the levy of an execution which overrode Bingham's title.

Such proceedings were had in the case of *Jones and Akin* v. *Hoge* that the bill was dismissed and judgment rendered in favor of Hoge against the complainants and Bingham for the debt enjoined, and Akin paid the recovery. On the 7th of September, 1868, he filed this bill to hold the Binghams liable for the amount he had thus paid, upon the ground that the transfer to James S. Bingham of the debt of John T. Bingham to Jones was to secure any judgment which might be rendered in favor of Hoge in the injunction suit, and upon the further ground that he only consented to join in the injunction bill upon the express condition, and upon the express representations of Bingham that the balance due from him on his land note should be held as a trust fund to pay any recovery that might be had by Hoge. The bill also insists that Pinkard's execution was never levied on the land, or, if levied, that the lien had been lost by laches. The facts on which the equity of the bill is made to rest are denied by the Binghams in their answer, and, in the opinion of the Chancellor, were

not sustained by the proof. He held that John T. Bingham was entitled to credit on his note for all the payments made by him previous to the transaction of the 17th of June, 1865, for the unpaid debt of Jones to his vendor, and for the amount paid on the Pinkard judgment, but that the complainant was entitled to subject the residue of the debt, if any, and he ordered an account accordingly. The complainant appealed by leave of the court before the account was taken.

The complainant being himself a principal in the Hoge judgments, in the bill enjoining their collection, and in the injunction bond, it is obvious that any transfer of property by his co-principal to indemnify the surety could not possibly inure to his benefit unless there was a positive agreement of the parties to that effect. It is equally obvious that any transfer by his co-principal of his own property to secure the creditor in the absence of a similar express agreement could not inure to the complainant's benefit, for his bill concedes what the proof shows, that there has never been any settlement of the partnership accounts, and he cannot be a creditor of his co-partner until this is done, and a balance found in his favor. The instruments of the 17th of June, 1865, do not on their face declare any such agreement. The complainant is not mentioned therein except as one of the principals in the injunction bill filed against Hoge. The first ground of relief assumed in the bill fails, therefore, necessarily, since it is rested only on the legal effect of the instruments.

If it be conceded that the transfer was made upon the express condition that so much of the note should be held to pay any recovery by Hoge, yet if the Pinkard execution, by virtue of its levy on the land, was a lien superior to the title acquired by Bingham under his purchase, there would be, to the extent of such lien debt, a failure of consideration, Jones being insolvent, and the security would be lost to all parties. And even if the alleged lien could, upon litigation, be shown to be without foundation, yet if Jones recognized it in good faith as valid, and sanctioned its payment, there would be equally a failure of consideration. The lien was seriously asserted by proceedings in court, and there is nothing in this record to show that either Jones or Bingham acted otherwise than under the honest belief that the judgment had to be paid to make the title to the land good.

The theory of the bill is that Jones had, as between him and complainant, become bound to pay the Hoge debt, and that the injunction bill was filed for his benefit, and upon an agreement by him, to which J. T. Bingham was a party, that complainant was to be indemnified by the pledge for that purpose of so much of the Bingham note. It does appear that the executions of Hoge were levied on the personal property of Jones to an amount sufficient to satisfy them, yet complainant testifies that Jones was then insolvent, and that complainant was afraid his property would be levied on. The bill, too, was based on matter which went to the merits of the Hoge debts, and, if

successful, would have inured to the benefit of complainant. It is certain, moreover, that no transfer was made until after the injunction bond was executed, and then without the presence of complainant. Under these circumstances, all the writing being against him, the bill and bond showing a primary liability on his part, and the instrument of transfer reciting the same fact and containing nothing in conflict therewith, the burden of proof is clearly upon the complainant.

The allegations of the bill are met by the denials of the answer, and the deposition of the complainant is equally met by the deposition of the defendant. The only evidence which supports the theory of the bill is that of Jones. His testimony is, in substance, that he told complainant that he had procured Bingham to go security, and had provided for the payment of the debt, if the suit should go against them, out of the money owed for the land; that Bingham was present and joined in the representations, and told complainant to sign the bond, that there was no risk about it. A single witness uncorroborated is probably not sufficient, either upon general principles or the peculiar nature of this case, to overcome the positive denials of the answer. But the witness only testifies to representation, not to a contract. The representations were honestly made, and true at the time.

There was no express condition such as the bill avers, nor were the representations of Bingham, as deposed to by Jones, more than expressions of opinion, without any element of a contract, or any intention to influence the complainant's action, except in the

way of persuasion; nor does the record show that they did otherwise influence him.

The Chancellor's decree will be affirmed with costs, and the cause may be remanded to take the account.

3L 324
6L 105
11L 661

ANDY HARRIS *v.* THE STATE.

CRIMINAL LAW. *Indictment. Clerical mistake.* A clerical mistake in the date of the passage of a statute in the recitals of an indictment for a misdemeanor is no ground for the arrest of judgment after conviction, the offense being otherwise sufficiently described, and the recital of the act unnecessary.

FROM SMITH.

Appeal in error from the Circuit Court of Smith county. N. W. MCCONNELL, J.

B. F. C. SMITH for Harris.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The indictment under which the plaintiff in error was convicted avers that he did unlawfully sell spirituous and alcoholic liquors without first appearing before the clerk of the county court of the county in

which such liquors were proposed to be sold, and taking and subscribing an oath not to adulterate or suffer to be adulterated any liquors sold or offered to be sold by him, and without giving bond in the sum of five hundred dollars, with good and sufficient security, for the payment of all costs arising from prosecutions for violations of the provisions of the act of the General Assembly, ch. 81, secs. 1, 2, 3 and 4, passed March 16, 1850, contrary to the form of the statute in such cases made and provided, etc.

The act of 1850, ch. 81, was not passed on the 16th of March, and is, moreover, a private act. It is the act of 1860, ch. 81, which, by its first three sections, makes the adulteration of spirituous and vinous liquors by poisonous ingredients, or the selling thereof, a felony, and by sec. 4 makes it unlawful to sell, or offer to sell, any spirituous or alcoholic liquors until oath has been taken and bond given as set out in the indictment.

By sec. 10 the violation of the provisions of sec. 4 is made a misdemeanor, punishable by a prescribed fine. The plaintiff in error moved in the court below that the judgment be arrested, which motion was overruled. The error now relied on is, that the State is bound by the recitals of the act in the indictment, and there being no such act that no offense is charged, and the judgment should have been arrested.

The indictment is for selling liquor without taking the oath and giving the bond specified. The charge would constitute a misdemeanor under the act of 1860, and no offense at all under the act of 1850, or any

other act. By the Code, sec. 5118, "neither presumptions of law, nor matters of which judicial notice is taken, need be stated in the indictment." The court takes judicial notice of all general laws, and therefore the indictment before us would have been sufficient if it had charged that the defendant sold spirituous liquors without first having taken the oath and given the bond prescribed, contrary to the form of the statute in such cases made and provided. And it is not easy to see how a recital of the substance of the statute in relation to the bond can change the result, even if there be a mistake as to the date of the statute.

The argument, pressed with earnestness and ability, is, that although unnecessary, the recitals of the substance and date of the act become material by being embodied in the indictment, and must be established by the proof.

The general rule has been in felony cases, that if the facts constituting the offense are set out in the indictment with more particularity than necessary, they must be proven. The test of this rule, as stated by this court, is whether a conviction or acquital could be relied on as a good plea to another indictment, omitting the unnecessary averments. And the court add, "All variances not inconsistent with the validity of both proceedings may be shown to be merely technical." *Hite* v. *State*, 9 Yer., 358, 378. Accordingly, when an indictment for selling liquor on Sunday stated the date of the offense on a day of the month which was not Sunday, the averment was treated as

surplusage. *State* v. *Eskridge*, 1 Swan, 413. No doubt everything which goes to constitute the offense charged, even if it purport to be the words of a statute, must be sustained, for otherwise the defendant might be charged with one offense and convicted of another. But when the offense is correctly set forth according to the statute, and the statute itself otherwise identified, a variance between the date of the act as charged and its real date, may well be considered as technical. A conviction or acquital would certainly be conclusive in defense of any other indictment for the same offense. By the Code, sec. 5117, only such degree of certainty is required in an indictment as will enable the court to pronounce judgment upon a conviction according to the right of the case. Less strictness, it has always been held in this State, is required in indictments for misdemeanors than for felonies. A mere clerical error in the date of a statute, where it is obvious the defendant could not be prejudiced thereby ought not to vitiate an indictment for a misdemeanor.

It might be different if the statute referred to in the indictment did in fact create a substantive offense, for in that case there would be an offense charged, although not the one intended. But when the act mentioned creates no offense whatever, there is not the least danger of prejudicing the defendant by treating the error as technical and clerical.

Affirm the judgment.

3L 328
4L 314
1pi 450

JAMES T. BELL *v.* WATSON & BRO.

1. REVENUE LAWS. *Construction.* A safe and sound rule of construction of revenue laws is to hold, in the absence of express words disclosing a different intent, that they were not intended to subject the same property to be twice charged for the same tax, nor the same business to be twice taxed for the exercise of the same privilege.

2. LICENSE TAX. *Livery Stable Keepers. Buggies.* Where, therefore, a revenue law declared the business of carrying on a livery stable to be a privilege, for the exercise of which a license tax was imposed, and also made the running of "hacks, carriages, and wheeled vehicles" for profit, a privilege subject to a license tax, it was held that a livery stable keeper who had been duly licensed for the year, could not be required to pay a license tax on each buggy used in his business, the proof showing that the letting of buggies for hire was a part of the business of a livery stable.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. N. BAXTER, J.

GUILD & DODD and ATTORNEY-GENERAL LEA for Bell.

STUBBLEFIELD & CHILDRESS for Watson & Bro.

COOPER, J., delivered the opinion of the court.

Watson & Brother were the keepers of a livery stable, and took out a license for one year from the 13th of March, 1875, as provided by law. They kept as part of their stock two buggies, for hire to customers for compensation. James T. Bell, the clerk of

the County Court, required them to take out license during the same year for the privilege of hiring these buggies for profit. They paid the tax under protest, and brought this suit for the recovery of the money. The evidence introduced on the trial was, that the hiring of buggies to third persons to be driven by themselves, was a part of the bnsiness of a livery stable, and that the buggies in question were only used in this way. The Circuit Judge, who tried the case without a jury, gave judgment for Watson & Bro., and Bell appealed in error.

By the act of 1873, ch. 118, sec. 46, the occupations that shall be deemed privileges and taxed as such, not to be pursued without a license, are enumerated. Among these are the keeping of livery stables, and the running of "hacks, carriages, drays, and wheeled vehicles" for profit. The privilege tax for keeping a livery stable is so much on each stall in the stable, and the tax for the privilege of running hacks for profit is a fixed sum on each vehicle. T. & S. Rev., sec. 553*a*, sub-sections 35, 71.

If the case turned upon the question, whether a buggy was a wheeled vehicle within the meaning of the statute, the conclusion would probably be, that it was not only literally, but in view of the legislative intent as shown by the vehicles enumerated, fairly embraced in the language used. *City of Memphis* v. *Battaile*, 8 Heis., 524. The real question, however, is whether the Legislature intended that the keeper of a livery stable should pay a license tax for the privilege of carrying on the business, and also separate license

taxes for the privilege of exercising essential parts of that business. Under the evidence introduced, the question is the same as if the statute had made the letting of horses for hire a privilege, and the keeper of a livery stable were required, in addition to his regular license tax,to pay license taxes on each horse.

Whatever power the Legislature may have to levy double taxes, the presumption always is against such an intent. The statute will not be construed so as to impose duplicate taxation, unless the construction is required by its express words or necessary implication. Cooley on Taxation, 165. The taxation of vehicles run for profit, finds ample scope in cases where they are run by the owners independently, and not as a part of a licensed business.

The statute contains an analogous instance in which the Legislature has shown that double taxation was not intended. Thus express companies, omnibuses, express wagons and carts, and transfer wagons, are severally enumerated as requiring for the privilege of the business or use, a license to be obtained by the payment of a tax. If, now, the tax were paid and the license obtained to carry on business as an express company, the business could not be exercised without the use of express or transfer wagons. So in the case of omnibus companies. But the Legislature, in placing the tax on express wagons and carts, including wagons and carts engaged in transferring, exempted those belonging to express and omnibus companies. T. & S. Rev.,

section 553*a*, sub-sec. 38. It may be said, it is true, that as the Legislature did expressly make the exemption in these cases, and did not similarly provide for the keepers of livery stables and their vehicles, the presumption would be, that no such exemption was intended in the latter instance. But it is more reasonable to conclude, that as the Legislature has declared against double taxation in one instance, they did not intend it in any instance, unless they have plainly or by necessary implication said so. It is, moreover, almost certain that the exemption was made in the particular case because the necessity was obvious, and overlooked in the other because the necessity was not apparent. The connection between the business of a livery stable and the running of "vehicles" for profit, was certainly not very obvious. The safe and sound rule of construction of revenue laws is to hold, in the absence of express words plainly disclosing a different intent, that they were not intended to subject the same property to be twice charged for the same tax, nor the same business to be twice taxed for the exercise of the same privilege.

In order to prevent misconstruction, it is proper to add, that the present rule only applies in a case where the occupation or business, the privilege tax upon which would be a double charge, is an essential part of the business for the exercise of which a license had been taken out. The running of an express wagon is a necessary part of the business of an express company. The running of a buggy is, according to the evidence in this case, an essential part of the bu-

siness of a livery stable keeper. On the other hand, although the running for compensation of an express cart, transfer wagon, hack, carriage, or other vehicle, might be useful, convenient and profitable to a hotel or tavern, it could in no sense be said to be a part of the business of keeping a hotel or tavern, nor would the running of billiard tables, or a drinking saloon, *et sic de similibus*. *Woodman* v. *The State*, 2 Swan, 353.

The judgment below will be affirmed with costs.

3L 332
4L 648
6L 104
8L 75
8L 290
9L 647
12L 254
3pi 163
4pi 141

3L 332
116 43

STATE *ex relatione* v. MCCONNELL.

1. CHANCERY PRACTICE AND PLEADINGS. *Bill in name of the State. Attorney General a necessary party. When.* The Attorney General is a necessary party complainant to a bill filed in the name of the State, on the relation of a third person, to test the title of a Circuit Judge to the office under the Code, section 3409 *et seq.*

2. CONSTITUTIONAL LAW. *Act creating Judicial Circuit.* Under an act entitled an act to create and establish a new judicial circuit, a change in adjoining circuits by detaching one county from one of these circuits and attaching it to another, is sufficiently germane to the object as to be embraced in the caption as one subject, under the Constitution, Art. 2, sec. 17, and the positive provision takes the act out of that class of cases intended by that part of the same section of the Constitution which relates to "acts which repeal" former laws.

State *v.* McConnell.

3. SAME. *Constitution, Art. 2, Sec. 18. Failure of Journals to show all the readings of an Act.* The mere fact that the Journals of the Senate fail to show the second reading of a bill, will not affect its validity as an act, when it appears that it was passed on three several readings in the House of Representatives, and two readings in the Senate, one ot them purporting to be the third reading, at which time it was passed with all the requisite formalities, and that it was signed by the Speaker of each House in open session, and approved by the Governor, in accordance with the requirements of the Constitution, Art. 2, section 18.

FROM SMITH.

Appeal from the Chancery Court at Carthage. W. G. CROWLEY, Ch.

J. J. TURNER for complainant.

E. L. GARDENHIRE for defendant.

COOPER, J., delivered the opinion of the court.

By an act of the General Assembly, passed on the 14th of March, 1873, and taking effect from its passage, entitled "An act to create and establish the sixteenth judicial circuit in this State," a new judicial circuit was established, one county of which, namely Overton county, was taken from the fifth judicial circuit. By the fifth section of the same act, the county of Trousdale was detached from the seventh and attached to the fifth judicial circuit, and by the seventh section the Judge and Attorney General of the fifth circuit were assigned to hold and attend the courts of that county.

The change was carried into effect, and the county of Trousdale from that time became practically a part

of the fifth judicial circuit. At the general election of Judges in this State, held in August, 1878, the defendant, N. W. McConnell, a citizen of Trousdale county, was elected Judge of the fifth judicial circuit, and was commissioned by the Governor as such. On the 30th of October, 1878, this bill was filed, in the name of the State of Tennessee, by N. B. Williams, relator, against N. W. McConnell, calling in question his title to the office of Judge of that circuit, upon the ground that the act of the 14th of March, 1873, was not read three times in one branch of the General Assembly, and the further ground that the fifth and seventh sections were not embraced within the caption of the act, nor was the pre-existing statute by which Trousdale county was made a part of the seventh judicial circuit constitutionally repealed.

Williams, the relator, was not one of the candidates voted for in the judicial election, but was a citizen of one of the counties comprising the fifth circuit. The bill was filed by private counsel employed by him, and neither signed nor sanctioned by the Attorney General for the district, nor the Attorney General for the State. Upon demurrer, assigning as one of its causes that a bill to remove a public officer on relation of a citizen, would only lie in the name of the Attorney General, the Chancellor dismissed the bill and the relator appealed.

The bill on its face purports to be filed "Under the Code, sections 3409 to 3431, and in the nature of a *quo warranto* proceeding at common law, to declare said McConnell a usurper of said office, and not en-

titled to exercise its powers, perform its duties, or receive its emoluments." The demurrer upon these allegations squarely raises the question, whether a bill on the relation of a private citizen, without the intervention of the Attorney General, can be sustained under the provisions of the Code on which the bill is confessedly based.

It was held at an early day by this court, that neither the ancient writ of *quo warranto*, nor the information in the nature thereof, was ever in force in this State, and this decision has been adhered to. *State* v. *Turk*, M. & Y., 286; *Attorney General* v. *Leof*, 9 Hum., 755. Both the State and individuals were remitted to other remedies for the accomplishment of the ends aimed at by those proceedings. The Legislature, from time to time, passed acts which were intended to answer, in particular instances, the same purposes. Some of these acts, with supplementary provisions, were brought forward into the Code. By statutory provisions then enacted into law, particular modes were pointed out for contesting elections, and, independently, for preventing the usurpation of an office. It has been held that the two classes of cases are entirely distinct. A contested election, this court has said, is not a case to which the State is a party, nor is it the duty of the district Attorney General to attend. The contest is, it is added, not analogous to a bill in the nature of a writ of *quo warranto*, and it cannot be tried under the provisions of the Code, sections 3409 to 3423. *Boring* v. *Griffith*, 1 Heis., 456.

This bill is expressly filed under the sections thus

referred to. These are the provisions of the Code manifestly designed to supply the place of the writ of *quo warranto*, or of the information in the nature thereof, which were held not to be in force. They do undertake to provide a remedy "whenever any person unlawfully holds or exercises any public office or franchise, or any office in any corporation created by the laws of the State." The same mode of redress is provided "whenever any public officer has done or suffered to be done any act which works a forfeiture of his office," and when a corporation does or omits acts which amount to a surrender or forfeiture of the rights and privileges of a corporation. So if any persons act as a corporation without authority of law, or any corporation exercises powers not conferred by law, or fails to exercise powers conferred which are essential to the corporate existence. So to bring officers of corporations, or trustees of funds given for a public or charitable purpose, to account. In all these, as well as some other enumerated cases, the remedy provided is thus stated:

"3411. The suit is brought by bill in equity, filed either in the circuit or chancery court of the county or district in which the office is usurped or held, or the corporation or supposed corporation holds its meetings or has its principal place of business.

"3412. The suit is brought by the Attorney General for the district or county, when directed so to do by the General Assembly or by the Governor and Attorney General of the State concurring.

"3413. It is also brought on the information of

any person, upon such person giving security for the costs of the proceedings, to be approved by the clerk of the court in which the bill is filed."

The purposes for which the suit "by bill in equity" is given by the sections of the Code referred to, are those which were attained at common law by the writ of *quo warranto*, or by information in the nature thereof. In other words, the statute gives a new remedy for old wrongs. The settled rule in such case is to construe the law so as to interfere as little as possible with the previous practice, and the decisions of the court on the subject of legislation.

The bill authorized to be filed is, to use the language of the opinion in *Boring* v. *Griffith*, above quoted, "a bill in the nature of a writ of *quo warranto*," and therefore unlike a contested election case, requiring in its very nature the State to be a party by its Attorney General. The writ of *quo warranto* was a high prerogative writ for the sovereign or government, suable only by the public prosecutor. High on Ext. Rem., sec. 591. It would seem to follow logically under the rule mentioned, that the "bill in equity" for the same purpose, in lieu of the old writ, could only be filed by the State's officer.

But the provisions of the Code embraced in the sections above quoted in *haec verba*, are taken from the act of 1846, ch. 55, secs. 5 and 6. Section 5 of that act provides that the Attorney General, on behalf of the State, may file a bill in the circuit or chancery court "whenever it may be deemed proper by the Legislature of the State, or the Governor and Attorney

General for the time being, the latter officers concurring therein, that judicial inquiry shall be instituted to ascertain whether any corporation, by non-user or abuse of its franchises, has incurred a forfeiture of its charter." Section 6 commences thus: "When the said bill in equity shall be filed by the Attorney General at the relation of any individual or individuals, it shall be lawful for the court in its discretion to require bond," etc. That act clearly contemplates that the bill which may be filed for any of the purposes therein provided for, shall be filed by the Attorney General, whether it be by direction or on information. Its provisions are brought forward into the Code, in sections 3409 to 3413.

One general rule in the construction of the Code is, "thas in doubtful cases it will be presumed that it was not intended to change but only to revise or compile the old statutes." *Bates* v. *Sullivan*, 3 Head, 633; *Tennessee Hospital* v. *Fuqua*, 1 Lea, 611; see also *Clement* v. *Kaighn*, 2 McCarter, 56.

The reading of sections 3412 and 3413 together, leads to the same conclusion, without reference to the pre-existing law. The "suit," says section 3412, "is brought by the Attorney General, when directed by the General Assembly." "It is also brought," says section 3413, "on the information of any person." By whom? Manifestly by the Attorney General.

The section does not say that the suit shall be brought by the relators, but on their information. The sense and grammar of the two sections require, by necessary implication, the suit on relation to be by

the same person as the suit when directed, and that person is the State's Attorney. Beyond all doubt the suit provided for under these sections was intended to be a suit by the State to subserve the public interests, and this end can only be attained by having the State represented by its proper officer.

It is true the act of 1846 does not undertake to provide a remedy for the usurpation and forfeiture of public office. But the remedy provided by the Code is precisely the same for all classes of cases enumerated. If the Attorney General is a necessary party to a suit, "by bill in equity," on information touching a corporation, he is equally necessary where the suit relates to the usurpation of a public office.

No good reason has been suggested or occurs, why the new remedy given by the statute should not be controlled by the State, as was the old remedy which it was intended to replace. The authorities are numerous and uniform, both in England and America, that where the object is to declare a forfeiture of a charter of incorporation, the government alone can institute the proceedings. High on Ext. Rem., section 654; Ang. & Ames on Corp., 747, and cases cited. The reason is, that the government having created the corporation for the purposes declared in its charter, ought to have a voice in its destruction. It may waive a forfeiture which the court can only declare. *The State* v. *Merchants Ins. & Tr. Co.*, 8 Hum., 235–255; *Murphy* v. *Farmers Bank*, 20 Pa. St., 415; *State ex rel.* v. *White's Creek Turnpike Co.*, 3 Tenn. Ch., 163. *A fortiori*, ought the State, as representing the people,

to be heard in a proceding to test the title to a public office, and the authorities are equally uniform to this effect. High on Ext. Rem., section 623 *et seq.; State ex rel.* v. *Leonard*, 3 Tenn. Ch., 177. The right of a private person to contest an election to a public office rests upon the statute, and can in no way impair the right of the government. *People* v. *Holden*, 28 Cal., 123. In every other case provided for by the Code, as for example the calling to account the trustees of a public charity, the necessity of the State being represented is equally obvious.

Whether the previous consent of the court is required before a bill can be filed by the Attorney General on information under the provisions of the Code, is a point not raised by the record, and need not be considered. See High on Ext. Rem., sec. 605. Be this as it may, the court is of opinion that a bill on information, under the Code, section 3413, can only be filed by the Attorney General.

The court is also of opinion that the demurrer is well taken on the merits. The establishment of a new judicial circuit in a State already divided into circuits, must necessarily require some change in the circuits previously existing, and such change may well be considered as germane to the subject and embraced in a caption embodying the general object. *Cannon* v. *Mathes*, 8 Heis., 504. And the positive provision of the act by which a designated county is expressly detached from one circuit and attached to another, takes the act out of the class of cases intended by that part of the 17th section of the second article of

the Constitution of 1870, which relates to "all acts which repeal" former laws. *Morrill* v. *Fickle*, 3 Lea. The bill concedes that the act under consideration was signed by the speakers of both Houses of the Legislature, and by the Governor, after having been properly passed on three several readings in the House of Representatives, and two readings certainly in the Senate, one of these purporting to be the third reading, when the vote was taken by ayes and noes.

It was conceded in argument that the Journals of each House show the passage of the bill on its third reading with all the constitutional formalities.

Under these circumstances, the presumption in favor of the regularity of the passage of the act through all its stages is so strong that the mere failure of the Journals of the Senate to show a second reading, if the fact be that way, would not affect its validity, but would be treated as a clerical omission.

It is not pretended that parol evidence would be admissible to sustain the averment of the bill.

The Chancellor's decree sustaining the demurrer, and dismissing the bill, will be affirmed with costs.

3L 342
5L 977
1pi 251

MARY PARSONS, by next friend, *v.* G. W. KINZER *et al.*

1. CHANCERY PRACTICE AND PLEADINGS. *Persons of unsound mind. Suit by next friend.* A bill may be filed in the name of a person of unsound mind by next friend, either before or after inquisition, if there be no committee or guardian.

2. WILL. *Construction.* A father having only two children, a son and a daughter, the latter being of weak mind, sold to his son a tract of land for $7,500, taking his 75 notes for $100 each, payable at intervals of a year for 75 years, and on the same day made his will, by the third item of which he bequeathed as follows: "I also direct that my daughter, Mary Parsons, have seven thousand and five hundred dollars' worth of notes, or the proceeds of the same, that I now hold on Elijah P. Parsons, to be paid in different payments, the first note becoming due on the first day of May, 1862, for one hundred dollars, due on the first day of May in each year annually, until the above named sum is paid to her or the heirs of her body." Held that the notes themselves passed, under the will, to the daughter.

3. SAME. *Same. Election by the Court.* The testator's son, to whom the residue of this estate was given by the will, having died leaving a wife and children, this bill was filed against his personal representative, widow and children, for a declaration and enforcement of the daughter's right. Held that complainant had a lien on the land for which the notes were given for their payment, which was fixed by the filing of the bill; that, whether any children she might have were entitled to an interest in the legacy or not, complainant might have the value of the notes realized under the Code, sections 3328, 3719; that it was manifestly to the interest of the infant children of the son, that this value should be fixed upon the land in lieu of the 75 years annual payment of $100 cash, and the court would so elect for them, and that the enforcement of the debt might be suspended to suit the convenience of the parties by the payment of interest. Held, also, that while the son's widow, to whom a part of the land might have been allotted in dower, could not be affected by this change, she would be bound to keep down her proportion of the annual burden of $100, during the existence of the dower estate.

Parsons *v.* Kinzer.

4. APPEAL FROM A DECREE. *Rights of parties who do not appeal.* Under the provisions of the Code, secs. 3155, 3159, if a decree adjudges independent rights, it will remain in force as to those parties who do not appeal, and be vacated as to other parties who do appeal, and *e converso* where the proper decree will necessarily affect the parties who have not appealed, the appellate court will determine the whole case as it stood before the hearing below, although an appeal be taken only by one party.

FROM MAURY.

Appeal from the Chancery Court at Columbia. W. S. FLEMING, Ch.

W. S. RAINEY for complainants.

N. R. WILKES for defendants.

COOPER, J., delivered the opinion of the court.

On the 20th of March, 1861, Bennett G. Parsons conveyed to his only son, Elijah P. Parsons, by deed in fee, reserving to himself a life interest, two tracts of adjoining land, containing about one hundred and sixty-two acres, for the consideration of $7,500, secured by seventy-five notes of the son for $100 each, payable respectively on the 1st of May, 1862, and annually thereafter on the same day of each succeeding year until the 1st of May, 1936, without interest.

On the same day, Bennett G. Parsons made his will, by which, after providing for the payment of his debts, he gave to his only daughter $100 in money, a horse, and some articles of household furniture, and then made the following singular bequest: "Item 3. I also direct that my daughter, Mary Parsons, have

seven thousand and five hundred dollars' worth of notes, or the proceeds of the same, that I now hold on Elijah P. Parsons, to be paid in different payments, the first note becoming due on the first day of May, 1862, for $100, due on the first day of May in each year annually until the above named sum is paid to her, or the heirs of her body." The residue of his property, subject to the dower of his widow, the testator gave to his son.

The testator died on the 15th of August, 1862. His will was duly proven and recorded, and the executor qualified according to law. He administered the estate by paying the debts, which were few in number, and executed the will by delivering to the testator's daughter the money and personal chattels bequeathed, and also the notes of the son for $7,500, so taken as aforesaid, and the residue of the estate, after the allotment of dower, to the son.

The testator's daughter, who was about forty-two years of age at her father's death, has always been a person of weak mind, though only recently so found to be by the verdict of a jury. She lived with her brother, after her father's death, as a member of his family. He died in July, 1872, intestate, leaving a widow and six children. G. W. Kinzer was appointed and qualified as the administrator of his estate. Dower in his lands was allotted to his widow, who afterwards intermarried with L. A. Goslin. Mary Parsons, the testator's daughter, after her brother's death, lived for a time with his widow, and afterwards in a house on the dower land, near to the residence of Goslin and

wife, doing her own house work, but being furnished with provisions and fuel by them at a charge of $90, and afterwards of $70 a year. The administrator paid the annual notes of his testate as they fell due, partly to Goslin for rent and supplies, and partly to Mary Parsons herself.

This bill was filed on the 31st of March, 1877, after the inquisition finding her of unsound mind, by Mary Parsons through a next friend, to have a construction of the third item of her father's will, and the enforcement of her rights thereunder. The personal representative, widow and children of Elijah P. Parsons, together with the husband of the widow, are made defendants. The Chancellor, in his decree, says that the pleadings requiring him to construe the third item of the testator's will, he is of opinion and decrees that complainant "is entitled to the present value of said notes out of the land left by Elijah P. Parsons," and to a lien on said land for their payment.

Upon a reference to the master, the "present value" of the notes, on the 1st of May, 1878, was found to be $2,666.96. Allowing the excess over $2,500 for necessary expenses, the Chancellor made the interest an annual charge at six per cent, and ordered the children to pay $110 of the amount, and Goslin and wife $40. Goslin and wife alone appealed.

The defendants have raised no point as to the right of the complainants to file such a bill by next friend. It has been held by Chancellor Zabriskie, of New Jersey, that a bill cannot be filed by a person of unsound mind by next friend. *Dorsheimer* v. *Roorback*,

3 C. E. Green, 440. And some of the English rulings tend to limit the character of cases in which such a suit can be brought, or the extent of the relief obtainable. *Halfhide* v. *Robinson*, L. R. 9 Ch. App., 373; *Beall* v. *Smith*, L. R. 9 Ch. App., 85. But the text writers concur in the statement that a person of unsound mind may sue by next friend, either before or after an inquisition of lunacy, at any rate where there is no committee or guardian, and the weight of authority is in accord. 1 Dan. Ch. Pr., 83, 5th Am. Ed.; *Jones* v. *Loyd*, L. R. 18 Eq., 265; *Higginson* v. *Hall*, 10 Ch. Div., 235. The practice has been recognized in this State. *Stephens* v. *Porter*, 11 Heis., 341, 348.

The Chancellor was of opinion that the will gave the complainant the "worth" or value of the notes, or entitled her to an election between their "worth" and their "proceeds" as they fell due, and treating her as incompetent to make an election, that the court would elect for her, and under the circumstances, limit the election to the date of the decree. In either view, the bequest would thereby become a money legacy, and the notes remain the property of the testator's estate. Strictly speaking, the executor should be before the court, and the testator's estate under its control, in order to justify the decree. For the court might otherwise deprive the complainant of a positive advantage, before securing a better one. By the filing of the bill, the notes became a lien, and may, by decree, be fixed as a permanent lien on the land for which they were given, while the legacy would, unless

secured in this case, become a lien on nothing. It would never do to lose the substance for the shadow. A next friend cannot elect for a person under disability, and the court will not, unless the record enables it to make an intelligent and effectual election. *Haggard* v. *Benson,* 3 Tenn. Ch., 268. It is true no exception is taken to the want of a necessary party, and the administrator and children of Elijah P. Parsons, in their answers, concede that the property of the testator, both real and personal, was divided, and allotted in accordance with the will; that is, they add, "Elijah P. Parsons received all of the estate of the said Bennett G. Parsons, except the dower allotted to his widow, the seventy-five notes and small bequests to complainant." The admissions would, however, only be binding on the infants, if the court should be of opinion that their rights were not prejudiced thereby, and the admissions of neither answer would be conclusive upon the widow and her husband. It is not seen how the bequest to complainant, treated as a money legacy, could be a lien on any property, much less how it could be made a permanent charge upon the lands "left by Elijah P. Parsons," upon which the defendants could be required to pay interest. The tract of one hundred and sixty-two acres constituted no part of the testator's estate at his death, and could not be charged with the bequest treated as a money legacy. Nothing that the testator has said in his will could affect the rights of the purchaser and his heirs, and clearly the widow of Elijah would take that land, so far as it may be embraced in the dower, free from

any liability for a money legacy under the will, while she might hold the same land subject to the vendor's lien for the payment of the notes. So, although she may be bound to keep down the burden of the annual notes in the proportion in which the tract of one hundred and sixty-two acres is embraced in her dower, neither she nor her husband can be made to pay any portion of an annuity based on a money legacy under the testator's will. The testator's lands, after the exhaustion of the personalty, might be subjected to the satisfaction of the legacy, and that part of her dower which embraces land devised to her husband, might be compelled to bear its proportion of the burden. But we are not aware of any principle upon which her lands can be mortgaged, against her will, or charged with an annuity.

The Chancellor's decree, the equity of which is evidenced by the fact that the widow's own children have not appealed from it, may be substantially sustained upon other grounds. However singular it may appear, the testator made the contract of sale to his son expressly with a view to the condition of his daughter, and clearly intended by his will to provide for her a fixed annuity, even if she should live to extreme old age. He may have thought the son would take care of her for many years, and that afterwards the notes might be utilized for her support. Whatever may have been his ideas, the will gives her the notes themselves until the entire sum "is paid to her, or the heirs of her body." As a legatee she is a privy in title with the testator, and the vendor's

lien enures to her benefit. *Smith* v. *Hibbard*, 2 Dick., 730; 1 W. & T. Lead. Cas., 486. Whether the heirs of her body, if she ever has any, would take any benefit under the bequest, it is unnecessary to consider. Beyond all question, she is entitled to the notes as they fall due, for her annual support, and their value may be realized and the income thus appropriated, if more conducive to her comfort. Code, sections 3328, 3719. The evidence makes it evident that this course is advisable, although it may be not absolutely necessary. It is equally clear, that it is for the interest of the children of Elijah P. Parsons that the notes which are, by the filing of this bill, made a lien on the tract of land of one hundred and sixty-two acres for which they were given, should not be sold to third persons, to become a lasting burden for over half a century on the land. We think it manifestly for their interest that the actual value of the notes, as ascertained by the Chancellor, should be charged upon the land, and, instead of selling the land and re-investing the proceeds, that they should be allowed to pay the interest until some change of circumstances may render a different arrangement desirable, or they should voluntarily choose to remove the incumbrance by a payment of the debt. We place our decision upon the ground, that the arrangement is mutually for the interest of the complainant and the children, and that the one being under the disability of weakness of mind and the other of infancy, the court may act for them. A decree will, therefore, be drawn up declaring that the complainant

has a vendor's lien on the tract of one hundred and sixty-two acres for the security of the notes bequeathed to her which remain unpaid; that it is to the mutual interest of both parties that these notes be reduced to their present value as fixed by the Chancellor, and that value declared to be a lien on the land, not to be enforced so long as the interest is paid, until further order.

Except by consent of Goslin and wife, no part of this interest can be charged upon them, nor can any part of the debt, credited by reducing the notes to their present value, be charged on the dower lands. The widow took so much of the tract of one hundred and sixty-two acres as may be embraced in her dower, subject to its proportion of unpaid purchase money according to the contract, that is payable in annual instalments of $100 each. All she can be compelled to do is to keep down the burden of these notes to the extent of the proportion which the dower on the one hundred and sixty-two acre tract may bear to the residue of the tract. *Williams* v. *Woods*, 1 Hum., 408; *Featherston* v. *Boaz*, 1 Leg. Rep., 224. The record does not show whether any, and what part of that tract is included in the dower. The liability of Goslin and wife to this extent may be declared by the decree, and a reference had to ascertain the proportion. And as these children will have assumed the burden of the entire interest on the present value of the notes, they may have a decree against Goslin and wife, during the existence of the dower estate, for such part

of the annual note of $100 as they may be charged with upon the principle indicated.

It is argued on behalf of the infant defendants, that neither they nor the complainant have appealed; that the complainant cannot, therefore, assign error in the decree, and it must stand as between them. But the Chancellor's decree fixes the value of the notes as a charge upon the lands of the infants. If we reverse the decree so far as it undertakes to charge Goslin and wife with any portion of the annual interest, the debt will remain against the land and be enforced, unless they, the children, pay the whole interest. That view of the law of chancery appeal would not be to their advantage.

By the Code, section 3155, "Either party dissatisfied with the judgment or decree of the Circuit or Chancery Court in a matter of equity tried according to the forms of the Chancery Court, may appeal to the Supreme Court and have a re-examination in that court of the whole matter of law and fact appearing in the record."

By section 3159, "Any one or more of the parties to a judgment or decree may pray and obtain an appeal therefrom, the judgment remaining in full force against such of the parties as do not appeal."

Upon examination of the article of the Code in which section 3159 is found, it will be seen that its provisions apply to all appellate proceedings at law, or in equity, and the words "pray and obtain an appeal" of that section, really mean, pray and obtain any process by which the cause may be brought into the

appellate court. That section applies principally to judgments at law, and such decrees as approximate in their nature to judgments. Taking the two sections cited together, this court has drawn the distinction between decrees, "in a matter of equity," severable in their nature, and decrees which would admit of no such separation. If a decree adjudges independent rights, it will remain in force as to those parties who acquiesce therein, and be vacated by the appeal of other parties. And *e converso*, where the proper decree will necessarily affect the parties who have not appealed, this court, although the appeal be taken only by one party, will determine the whole cause as it stood in the court below before any decree was rendered. *Grubb* v. *Browder*, 11 Heis., 299. The very nature of a chancery suit proper requires the presence of all parties interested, and a final determination of their rights.

In the case before us, a decision on the right of complainant to enforce her rights under the testator's will, either against the estate of the testator, or the estate of Elijah P. Parsons, involves necessarily the consideration of the nature of her demand, and the relative rights of all the parties growing out of its enforcement. The proper decree is not severable, for it involves, in addition to the rendition of a moneyed judgment, the proportioning of the burden on the property for which it was contracted, or in which the parties have different interests.

The decree will be modified in accordance with this opinion and the necessary reference made, for the ex-

ecution of which, as well as for the purpose of retaining the cause for farther order, the case may be remanded to the Chancery Court. The costs of this court will be paid one half by the appellants, the other half by the children; the costs below as directed by the Chancellor.

3L 353
6L 661
8L 16
10L 113
11L 157
3pi 285

L. M. Bentley *v.* Stephen Jordan *et als.*

1. Homestead. *Purchase money.* Under the homestead law of this State the homestead may be subjected to the satisfaction of a debt contracted for the purchase of the land in which the homestead right has been acquired, although the debt may have been changed in form by a new note with personal security, and at a higher though legal rate of interest, and although all the residue of the land has been taken by a creditor against whom the homestead exemption was effective.

2. Same. *Same.* The purchaser of land at a master's sale, under a decree enforcing a vendor's lien, paid to the master on his purchase notes the amount required to satisfy the vendor's lien and costs of suit, and executed to the defendant, who was entitled to the residue of the purchase money, a new note for such residue on time, with personal security, and at a higher though legal rate of interest, after which the land was seized by attachment in favor of a general creditor, against whom the homestead exemption was good, and then by the payee of the new note. Held, that the latter could subject the homestead to the satisfaction of the debt for the purchase money, although the general creditor had a prior lien on the residue of the land, the proceeds of such residue being insufficient to satisfy both debts.

3. SAME. *Chancery practice and pleadings. Sale free from equity of redemption.* When the homestead cannot be set apart, and it becomes necessary for a court of chancery to sell the land for the payment of debts, the court may order the sale upon the terms of the payment of $1,000 in cash for reinvestment in a homestead, and the residue in instalments on time, in accordance with the statute, free from the equity of redemption.

FROM MAURY.

Appeal from the Chancery Court at Columbia. W. S. FLEMING, Ch.

G. T. HUGHES, W. B. GORDON and A. COOPER for complainant.

I. N. BARNETT for defendant.

COOPER, J., delivered the opinion of the court.

In December, 1868, R. B. Moore sold to R. J. Polk a tract of land containing about 190 acres, partly for cash and partly on time. On the 27th of March, 1871, Moore filed a bill against Polk to enforce his lien for unpaid purchase money, and obtained a decree under which, on the 5th of February, 1872, the land was sold by the clerk and master, and bought by Stephen Jordan. On the 27th of February, 1873, Jordan, having paid all of the purchase money except $1,327.66, which was the excess of his bid over Moore's debt and costs, executed his note of that date, due January, 1874, to R. J. Polk for the amount of the excess, with Benjamin Harrison and F. M. Vaughan

as his sureties, the note calling for interest at the rate of ten per cent. per annum from date until paid. Thereupon the clerk and master reported that Jordan had paid the purchase money in full, the report was confirmed without exception, and title to the land divested and vested in Jordan. Afterward, on the 30th of August, 1873, Jordan, by voluntary deed, conveyed 115 acres of the land to his wife and children. On the 4th of April, 1874, L. M. Bentley, a creditor of Jordan for several thousand dollars, filed the original bill in this cause against Jordan, his wife and children, charging that the voluntary conveyance was fraudulent and void, and praying and obtaining an attachment on the whole tract of 190 acres for the security of his debt. On the 10th of April, 1874, R. J. Polk, for the use of L. E. Polk, filed a bill against the same parties, and also against Harrison and Vaughan as sureties, and L. M. Bentley, based on the note of $1,327.66, charging fraud in the voluntary conveyance, praying and obtaining an attachment, and asking for a personal decree against the principal and sureties on the note. Subsequently, other creditors filed bills to subject the land, upon similar ground, to the satisfaction of their several debts. The attachments were levied on the land in the order of priority in which the bills were filed. The defendants, Jordan and wife, in their answer, claimed a homestead right in the land. On final hearing the Chancellor declared the conveyance to the wife fradulent, gave the several creditors decrees for their debts, and subjected the land to the satisfaction thereof in the order

of priority of the filing of the bills. He was also of opinion, and so decreed, that Jordan and wife were entitled to the homestead right; that the homestead could not be laid off in kind because the value of the improvements exceeded the homestead exemption; that the land should be sold free from redemption upon time, except that $1,000, the extent of the homestead exemption, be paid by the purchaser in cash. The land was sold accordingly, and did not sell for a price sufficient to pay the demands of Bentley and Polk, after deducting $1,000, the homestead exemption. Upon application of Jordan and wife, the Chancellor ordered this fund to be paid to them upon their receipt. All parties acquiesced in these decrees except Polk, Harrison and Vaughan, against the two latter of whom a decree had been rendered in favor of the former for the amount due upon the Jordan note. These parties have brought up the case by writ of error.

The appellants insist that the note was given for the unpaid purchase money of the land in controversy, and that Polk has a vendor's lien or equity for its payment superior to the lien of Bentley's attachment. But it has long been settled in this State that the equitable lien of the vendor, which is recognized by the court of chancery after an absolute conveyance of the land to the vendee, may be waived, and that the taking of a note for the purchase money with personal security, raises a presumption of waiver. *Marshall* v. *Christmas*, 3 Hum., 616. The presumption, it is true, may be rebutted by evidence, but in this case there is no evidence in rebuttal. It has also

been held that the vendor in such a case has no priority over other creditors of the vendee, who may consequently acquire a specific lien on the land by legal proceedings superior to the mere equity of the vendor, although they have notice of the equity. *Roberts* v. *Rose*, 2 Hum., 145. Upon either of these grounds the Chancellor's decree in favor of Bentley, so far as the point under consideration is concerned, may be sustained. Nor is the result affected by the statement in Bentley's bill that the land is encumbered with a lien in favor of Polk, "as he is informed;" for, as we have seen, knowledge of the particular lien would not have prevented him from acquiring the prior right to satisfaction, and mere information could not have a greater effect.

A more difficult question is, whether Polk is not entitled, under our homestead laws, and without reference to the vendor's equitable lien, to subject the homestead right to the satisfaction of his debt by virtue of the fact that it is for the purchase money of the land. It is clear, and is conceded, that Bentley, who is only a general creditor as to the land in controversy, cannot reach the homestead by his attachment bill, filed after the accrual of the homestead right. But it is insisted that Polk, by reason of the character of his debt, stands in a better attitude, the homestead exemption affording no protection to his demand. The argument turns primarily upon the construction of the homestead laws.

The Constitution of 1870 provides as follows: "A homestead in possession of each head of a family, and

the improvements thereon, to the value in all of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. This exemption shall not operate against public taxes, nor debts contracted for the purchase money of such homesteads, or improvements thereon." Constitution, art. 11, sec. 11. The statute enacted to carry these constitutional provisions into effect, after providing for the exemption of the homestead from sale "under legal process," adds the following proviso: "And provided, further, that such estate shall not be exempt from sale for the payment of public taxes legally assessed upon it, or from sale for the satisfaction of any debt or liability contracted for its purchase, or legally incurred for improvements thereon." Act of 1870, 2d sess., ch. 80, sec. 1, T. & S. Rev., 2114a. Under these provisions it is obvious that the homestead is not exempt from sale "for the satisfaction of any debt or liability contracted for its purchase." It may be sold by execution issued on a judgment recovered on such a debt, or otherwise subjected by legal process. *Woodlie* v. *Towles*, 1 Memphis L. J., 68, 179; S. C. 1 Leg. Rep., 331. The creditor proceeds, not by virtue of the vendor's lien, which is only enforceable in equity, and may be lost by waiver, but by virtue of the general right of a creditor to subject his debtor's property by "legal process," the homestead exemption not applying to such a debt. Unless, therefore, the facts of this case take the "debt

or liability" out of the proviso of the statute, the right to subject the property covered by the homestead claim to its satisfaction, would seem clear.

The sale in this case to the claimant of the homestead was made by the clerk and master of the chancery court, under the orders of that court, and the notes for the purchase money were made payable to him. After the purchaser had paid the balance due to the original vendor, the complainant in that suit, and the costs of the cause, there remained a surplus of purchase money, for which he executed the note in controversy. The master, thereupon, reported that the purchase money had been paid in full, and this report was confirmed without objection, and the title to the land vested absolutely in the purchaser. Upon these facts it is argued that the debt, evidenced by the note, has lost the character which would entitle it to subject the property, notwithstanding the homestead exemption. To sustain this view, reliance seems to be placed on the fact that the sale of the land was made by the master, not by Polk—that the note was given on an extension of the time of payment, with personal security, and at a higher rate of interest than the original purchase notes, and that the fact of the payment of the original purchase notes was adjudged by the court, upon the master's report, when the title to the purchaser was made. The court acquired jurisdiction to order a sale of the land by virtue of the contract entered into between the complainant and defendant to the suit in the original trade. The court and its officer, the master, were, therefore, the agents

of the vendee, the owner of the land, as much so in reality, though not in form, as if he had executed to them a regular power of attorney to sell and appropriate the proceeds in conformity with the contract. He was entitled to the surplus proceeds of sale after satisfying the debt of his vendor and the costs of suit. If the master, after entering all proper credits on the notes given to him, had, under order of the court, transferred the notes to the defendant Polk, there could not have been a doubt that the unpaid balance would have been a "debt or liability contracted for the purchase" of the land. If, afterward, the purchaser had taken up the old notes by giving a new note, it would have been a simple renewal, the consideration remaining the same. And if he had secured the last note by personal security or a mortgage, the consideration would not have been altered, and any interest allowed by law would be a mere incident to the extension of the time of payment. What was done in fact, without the circumlocution, was nothing more in substance. The weight of authority is that a change in the form of the original evidence of debt, by a new and even higher security, or by additional security, either personal or real, will not alter the character of the debt, nor affect the vendor's right to satisfaction out of the land sold. *Austin* v. *Underwood*, 37 Ill., 438; *Hawkes* v. *Hawkes*, 46 Ga., 204; Thompson on Homestead, sec. 311, 359. To the same effect are our decisions on the general principle, *Dick* v. *Powell*, 2 Swan, 632; *Mulherrin* v. *Hill*, 5 Heis., 58, and in the particular case of the homestead debt,

Woodie v. *Towles, ut supra.* The form may be changed, but the debt, with all the equitable rights incident thereto, such as those which attach to the time of its creation, or the consideration for it, remain. *Id; Stratton* v. *Perry*, 2 Tenn. Ch., 633. It is the debt which the statute provides for, without regard to the form it may assume, or the additional security given. The recital in the deed of conveyance of land that the purchase money had been paid was never allowed to affect the vendor's equity. 2 Sto. Eq. Ju., sec. 1225. A similar recital in the decree vesting title can have no greater effect. The reason in both instances is, that the object of the recital is merely to give the purchaser an absolute title, not to affect the right to collect the purchase money in any mode allowed by law.

The fact is indisputable that the purchase money represented by the note in controversy has not been paid, and it is this fact which prevents the operation of the homestead exemption. The statute has guarded against the injustice of exempting land from liability for the debt by which it was obtained, an injustice so obvious that the courts of the States, where no statutory provision on the subject exists, have made the exception themselves. Thompson on Homestead, sec. 330. And so the courts of this State have held the vendor's lien superior to the widow's rights to dower, although other creditor's liens must yield. *Featherston* v. *Boaz*, 1 Leg. Rep., 224. All the authorities agree that the homestead continues liable as long as any part of the purchase money remains unpaid. *Bush* v.

Scott, 76 Ill., 525; *Harris* v. *Glenn*, 56 Ga., 94. If, in the meantime, all the land conveyed, except the part fixed with the homestead, has been seized by other creditors, it can make no difference. It is precisely as if the purchaser had himself sold the land, leaving only the homestead.

The Chancellor ordered the land to be sold free from the equity of redemption, but required the purchaser to pay $1,000 in cash for the homestead. It is, perhaps, not necessary to determine whether the order is entirely consistent with the law authorizing a sale free from redemption. Code, sec. 2124. The title of the purchaser and the sale cannot be affected by a reversal of the decree. Code, sec. 3186; *Livingston* v. *Noe*, 1 Lea, 66. But the statute which requires the land to be sold, where the homestead cannot be set apart, manifestly contemplates a sale for cash. Code, sec. 2117a. The object is to provide the family with a new home as soon as they are compelled to give up the old one. No reason occurs, or has been suggested, why the homestead interest or estate might not be sold for cash without infringing upon the spirit or letter of the redemption law, for the sale is, to that extent, of the debtor's property for his own benefit. In this case the debtor had acquired a homestead right, but that right is, by the terms of the statute, not exempt from liability by legal process for the unpaid purchase money.

The bill of R. J. Polk purports to be filed for the use of L. E. Polk, without stating whether the latter had any and what interest in the debt. No objection

was taken in the court below by answer or otherwise to this unusual form of chancery pleading. It is obviously too late to make any point upon it in this court.

The decree below will be reversed so far as it directs that the proceeds of the homestead be paid to Jordan and wife, and a decree will be rendered here subjecting the fund, so far as it may be necessary, to the Polk debt, the costs of this court being first paid out of the fund.

Any surplus would belong to Jordan and wife, to be reinvested in a homestead, and may be so applied.

W. A. CHAPMAN *v.* W. J. HOWARD.

APPEAL BOND. *Justice's judgment.* A motion to dismiss an appeal from a justice's judgment because the appeal bond was not accepted within the time prescribed by law, was properly sustained where the papers, filed on the first day of the next term of the circuit court, were endorsed by the justice, "returned without bond," although a bond dated as of the day of the filing be among the papers.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. W. S. MCLEMORE, J.

E. T. TALIAFERRO for Chapman.

F. SMITHSON for Howard.

COOPER, J., delivered the opinion of the court.

Howard sued Chapman before a justice of the peace on an open account. On the 28th of September, 1878, the justice rendered a judgment in favor of Howard against Chapman for $18, which was written, it seems, on the back of the warrant. Then follow the following endorsements on the warrant:

"Appeal prayed by defendant, W. A. Chapman, September 28, 1878. Granted. Returned without bond. J. P. C. Reed, J. P."

"Filed in office November 25, 1878. J. H. Harris, Clerk."

The first term of the circuit court after the rendition of the justice's judgment commenced on the 25th of November, 1878. On the 30th of the same month the plaintiff moved to dismiss the appeal "for the want of an appeal bond." On the 10th of the next month the cause was heard upon a motion, as recited in the judgment entry, to dismiss the appeal "because the appeal bond was not accepted within the time prescribed by law." The motion was sustained by the circuit judge, the appeal dismissed with costs, and the cause remanded to the justice to be proceeded with. From this judgment the defendant Chapman has appealed in error to this court. The transcript contains a proper appeal bond executed by Chapman,

with sureties, for the appeal from the justice's judgment, dated November 25, 1878.

In *McCarver* v. *Jenkins*, 2 Heis., 629, it was held that the provision of the Code, sec. 3141, requiring the execution of an appeal bond before the appeal is granted from the judgment of the justice, is directory. In *Poindexter* v. *Cannon*, 1 Leg. Rep., 205, the court seem inclined to limit the discretion of the justice to a few days' delay at the instance of the appellant at the time. It is very doubtful whether the liberal construction adopted for the attainment of the ends of justice in the first case may not prove more injurious than beneficial to litigants. But the utmost extent of liberality authorized by that construction was that when the appeal was prayed and granted within the time prescribed by law, the mere fact that the appeal bond was executed afterward, "if accepted and filed by the justice," would not vitiate the appeal. It may also be true that an appeal bond, returned to court with the papers, will be *prima facie* evidence that the appeal was prayed and granted.

In the case before us, the justice of the peace himself says that he returned the papers "without bond," and his power to accept a bond necessarily terminated with the return of the papers to the circuit court. *Prima facie*, no appeal bond had been then accepted. The bond itself does not show the contrary, either on its face or by any endorsement. If the fact were otherwise, the proper course would have been to move that the justice be allowed to amend

his return. An acceptance before the return day cannot be presumed in the face of the justice's return.

The judgment of the circuit court was correct, and must be affirmed.

3L 367
16L 245

ALVIS WILLIAMS *v.* H. P. POINTER.

APPEAL. *County to Circuit Court. Executor.* An appeal lies from the county to the circuit court from an order made upon a petition under the Code, sec. 2225, requiring an executor, who is excused by the will from giving bond, to give the usual administration bond.

FROM MAURY.

Appeal in error from the Circuit Court of Maury county. W. S. MCLEMORE, J.

H. COOPER and GEO. FRIERSON for Williams.

BARNETT & HUGHES for Pointer.

COOPER, J., delivered the opinion of the court.

By the Code, sec. 2225, no administration bond shall be required of an executor who is excused from giving one in the will, unless some person interested therein, by petition to the county court, suggest that

the executor is wasting, or is likely to waste, the estate of the testator. A copy of this petition must be served on the executor ten days before any motion is made for an order of court upon him to give the bond. Code, sec. 2226. And by sec. 2227 the order can only be made "upon satisfactory proof of the truth of the complaint." If the executor fail to comply with the order within three days, the court shall appoint an administrator of the estate, who shall give bond with surety, as executors are required to do.

By the will of M. L. Stockard, Alvis Williams was appointed executor and excused from giving bond, and after probate of the will he qualified without bond, and received letters testamentary. Within less than a month thereafter, H. P. Pointer filed his petition in the county court alleging that Williams was insolvent, and "likely to waste the assets" of the estate, and asking that he be required to give the usual administrator's bond. Such proceedings were had that the court found, upon proof heard, that Williams was insolvent and "likely to waste the assets," and required him to give bond within three days. Williams prayed an appeal to the circuit court, which was refused. At the expiration of the three days the county court appointed H. P. Pointer administrator, who gave bond and qualified according to law. Williams again prayed an appeal, and offered a proper appeal bond, but the court refused the prayer. He thereupon brought the proceedings into the circuit court by *certiorari*. Afterward his petition and writ were, upon the motion of Pointer, dismissed by the

circuit judge, and he prayed and obtained an appeal to this court. The appellee has now moved to dismiss this appeal, upon the ground that no appeal lies in such a case.

Either party, dissatisfied with the judgment or decree of the circuit court, has the right to have it revised by this court. Code, secs. 3155, 3172. The argument submitted on the present motion does not undertake to show that the judgment of the circuit court dismissing a *certiorari*, in lieu of an appeal, cannot be appealed from, but insists that the action of the county court was final, and its order not appealable. But that is the only point involved in the record, and to decide it is to determine the appeal on its merits. Strictly speaking, therefore, the motion cannot be entertained. The argument, however, calls upon the court to decide the point made, and the counsel for the appellant have not only argued the same point, but agreed that it might be decided. There can be no reason, under these circumstances, for delaying the final decision.

By the Code, sec. 3147, any person dissatisfied with the sentence, judgment, or decree of the county court, may pray an appeal to the circuit court, "unless it is otherwise expressly provided by the Code." And by sec. 3152, on appeal, "all jury cases in the county court shall be tried *de novo* in the circuit court; and all chancery cases, or proceedings in the nature of chancery cases, shall be reheard as if the proceedings had been commenced in the circuit court." All contests over the right to execute wills or administer estates, it has long been settled, are appealable. *Wright*

v. *Wright*, M. & Y., 43. And if the prayer for an appeal be refused, the writ of *certiorari* is the proper remedy to bring up the case for review. Const., art. 6, sec. 10; Code, secs. 3123, 3124; *Wilson* v. *Frazier*, 2 Hum., 30. The proceeding, under the Code, sec. 2225, is directed to be by petition upon notice, and the order of the court is required to be made "upon satisfactory proof of the truth of the complaint." The effect of the order, if adverse to the executor, is to deprive him of a right under the will of the testator sanctioned by the statute and perfected by the letters granted. The action of the court in determining the question of fact upon the proof is judicial, not ministerial. There is no express provision of the Code that an appeal shall not lie in such a case. It would seem necessarily to follow that the "sentence, judgment, or decree" of the court is one from which an appeal will lie. And the "proceedings being in the nature of chancery cases," the rehearing is as if the proceedings had been commenced in the circuit court. The only authority cited and relied on by the counsel of the appellee which is at all pertinent to the question raised, is *McClanahan* v. *McClanahan*, 12 Heis., 379, where it is held an appeal will not lie from the order of the county court appointing an administrator *pendente lite*. But the reason for that decision is that the appointment of such an administrator is in the nature of the appointment of a receiver, and intended to protect the estate pending the litigation, an object which would be thwarted by allowing an appeal.

The judgment of the circuit court dismissing the *certiorari* must be reversed, and the cause remanded to that court for further proceedings. The appellee will pay the costs of this court.

G. W. WEST and J. M. FARMER *v.* M. B. L. GORDON.

STAYOR. *Tender.* The stayor of a justice's judgment is entitled to have the execution thereon superseded and quashed, where the principal debtor has made a legal tender of the amount due to the judgment creditor, who refused to receive it, and this without bringing the money tendered into court.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. T. W, TURLEY, Sp. J.

B. F. MATHEWS and E. T. TALIAFERRO for West.

T. M. JONES and Z. W. EWING for Gordon.

COOPER, J., delivered the opinion of the court.

On the 7th of July, 1874, J. M. Farmer recovered two judgments before a justice of the peace against J. J. Latham, one for $73.76, and the other for $21.41. Under written authority from M. B. L. Gordon, the justice at the time signed his name as

stayor of the first of these judgments. Afterward, and about the time the stay ran out on both judgments, the justice, at the instance of Geo. W. West, the constable entrusted by the creditor with the collection of these claims, marked Gordon's name as stayor to the other judgment without any authority. Executions issued on both judgments against Latham as principal and Gordon as stayor, after which the justice erased Gordon's name as stayor of the smaller judgment. Both executions were, however, levied on Gordon's property. In the meantime Latham paid West, who had the executions in his hands, $48, directing him to credit the amount on the larger judgment. Instead of entering the credit as directed, West applied a sufficiency of the amount to the satisfaction of the smaller judgment, and only credited the larger judgment with the residue. Afterward Latham tendered the balance due upon the larger judgment, after deducting the $48 in full therefrom, which tender was refused. Thereupon Gordon, by petition setting out these facts, brought the proceedings into the circuit court and asked that the execution be quashed. A motion to dismiss the petition was overruled. The questions of fact were submitted to a jury, who found that there was a valid tender of the balance due on the larger judgment, which was refused, and that Gordon never was the stayor of the smaller judgment. From the judgment rendered upon the verdict that the executions be quashed, and that Gordon recover of the defendants his costs, the defendants appealed in error.

It is conceded that the execution on the smaller judgment was properly quashed. The only point made below, other than contesting the facts before the jury, and again renewed in this court is, that the defense of Gordon is, in effect, a plea of tender, and should have been accompanied by the money brought into court. The circuit judge charged the jury that the issue was not between the judgment creditor and the principal debtor, but between the creditor and the stayor, and was whether the stayor was released by the refusal of the creditor to accept the offer by the principal to pay the debt in full, and consequently that the rule which requires the money to be filed with a plea of tender was not applicable to the case. Conceding that the defense could be made at law, the charge was correct. The refusal to accept the money of the principal when legally tendered upon a past due debt, is a fraud upon the surety, and will constitute in his favor an equitable defense. *Johnson* v. *Ivey*, 4 Col., 608. The only doubt is whether such a defense can be made at law, and this doubt has been resolved, in this State, in favor of the surety. *Renegar* v. *Thompson*, 1 Lea, 457; *Gillespie* v. *Darwin*, 6 Heis., 21; *Lindsey* v. *Thompson*, 1 Baxter, 466. The eminent judge who delivers the opinion in the case last cited bases the conclusion partly on the statute, Code, sec. 4236, and partly "on the common doctrine of the courts of this country, that every defense which would discharge a surety in equity is recognized as valid by the courts of law." 2 Am. Lead. Cases, 147. Whether the rule is universally

true, it is not necessary now to determine. The present case falls clearly within the principle of the previous decisions.

It appears that after the principal debtor had made one tender of the money he placed it in the hands of the defendant in error, who made another tender thereof, which was also refused. It is suggested, rather than argued by counsel, that the defendant in error should be charged with the amount as still in his hands. So far as the record shows, no such point was made in the court below, the evidence not being directed to that end, nor the jury called upon to ascertain the fact. The court below cannot be put in error in that way.

The judgment must be affirmed.

8L 374
10L 292

W. M. STEWART, Adm'r, *v.* THOS. R. LOVE.

CHANCERY PRACTICE AND PLEADINGS. *Lien on live chattel. Sale in advance of final hearing.* Under a bill filed to enforce an alleged lien on a live chattel which remains in possession of the defendant, the court has no power, upon motion of the complainant, to order a sale of the chattel in advance of the final hearing, upon the ground that its value may otherwise be lost to the complainant.

FROM SUMNER

Appeal from the Chancery Court at Gallatin. G. E. SEAY, Ch.

MUNDAY & ELKIN for complainant.

J. J. TURNER for defendant.

COOPER, J., delivered the opinion of the court.

This bill was filed to enforce an alleged lien for the purchase money reserved by parol on a horse sold by the complainant's intestate to the defendant. The chancellor rendered a decree in favor of complainant for the purchase money, declaring a lien on the horse for the debt, and ordering a sale of the horse in satisfaction thereof. The defendant prayed an appeal to this court, which was granted upon his giving bond, or taking the oath prescribed for poor persons, within a limited time, and he has since perfected the appeal by taking the oath. After the prayer of appeal, but before appeal perfected, the complainant moved the

chancellor to order a sale of the horse, upon the ground that the lien was established by the proof and decree, that the horse was over fourteen years of age, that to place the horse in the hands of a receiver would be attended with an expense equal to his value, and that the horse would probably be lost pending the appeal. The chancellor refused the motion. The motion is now renewed in this court upon substantially the same ground, with the additional fact that the appeal is under the pauper oath. If the motion be considered as in substance a motion to revise the chancellor's action in the same matter, it could not be entertained for the reason given in *Scoggins* v. *Cowden*, 1 Lea, 134. Treated as an original motion, it is precisely as if it had been made in the court below before decree, the decree being vacated by the appeal, with the additional difficulty that the jurisdiction of this court is "appellate only." The property is and has been in the possession of the defendant, not of the court, and to have ordered a sale before decree would have been to have decided the case before the hearing. We do not understand that any such right exists in the court. *Cornell* v. *McCam*, 37 Md., 89. When the property is in the custody of the court, the court is compelled to act for both parties, not at the instance and for the benefit of one party only, and may, in extreme cases, where it is satisfied that a sale must eventually be made, order such sale in advance. *Gleaves* v. *Ferguson*, 2 Tenn. Leg. Rep., 25. But where the property is held by one of the parties, not by the court, and the other litigant applies for an or-

der of sale because he thinks the sale would be to his interest, we are not aware of any principle on which the application can be sustained. And to ask an appellate court to determine the merits of a litigatiou for this purpose in advance of the final hearing is certainly without a precedent.

The motion must be disallowed.

3L 376
6L 68
6L 221
13L 232
3pi 214

L. H. DAVIS *v.* THE STATE.

CONSTITUTIONAL LAW. *Witness fees.* The act of 1879, ch. 40, to prohibit speculation in witness fees, is constitutional.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. J. M. QUARLES, J.

KENNEDY & MORRIS for Davis.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

On the 31st of March, 1879, the Legislature passed an act entitled "An act to prohibit speculation in witness fees and other fees originating in courts." The

first section reads thus: "It is hereby declared to be a misdemeanor for any person in this State, either by himself or through an agent, to purchase, contract for, or otherwise speculate in fees due to witnesses for attendance as such in said courts, or to buy or speculate in any other fees for services rendered by third persons in said courts, for less than their face value; Provided, that the provisions of this bill shall not apply to witness fees traded for merchandise or hotel bills." Acts of 1879, ch. 210, sec. 1.

The plaintiff in error was indicted for a violation of the provisions of this statute. He moved to quash the indictment, which motion was overruled. He was then tried upon the plea of not guilty, convicted, and sentenced to pay a fine and the costs. He has appealed in error.

The defense is rested upon the unconstitutionality of the act, and the argument submitted in support thereof is made to turn on general principles, rather than on any specific provisions of the Constitution. The right of the citizen to freely dispose of his property, and the absence of substantial evil to be met by the legislation, have been more discussed than the inherent power of the Legislature. It is the settled rule in this State, as in the United States generally, that the Legislature has unlimited power of legislation, except so far as it is restrained by the Constitution of the United States, and the Constitution of the State of Tennessee. *Hope* v. *Deaderick*, 8 Hum., 8; *Bell* v. *Bank of Nashville*, Peck, 269. The legislative department is not made a special agency for the exer-

cise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion. They who insist upon the unconstitutionality of an act must point out the specific provision of the Constitution which is violated. The court can only interpose upon a plain violation of some positive provision of the organic law. Whether a statute is "contrary to the genius of a free people," is a question for the legislator, not the judge. It cannot be annulled upon supposed natural equity, the inherent rights of freemen, or any general and vague interpretation of a provision of the Constitution beyond its plain and obvious import.

The only citation from the Constitution made in the argument is the 8th section of the Bill of Rights, that no man shall be deprived of his liberty or property but by the judgment of his peers or the law of the land. And it is argued that the act in question, although in form a prohibition against the purchase of the fees of witnesses, is in fact a restraint upon the free disposition by the witness of the fees as property, and *pro tanto* a deprivation of an important element of property. But the claim of a witness for the fees allowed him by law is only a chose in action, not assignable by the common law. The Legislature has made such claims assignable, and it is clearly within its competency to take away that quality. With either the wisdom or policy of such legislation the courts have nothing to do.

It is also argued, upon the same general principle, that the act in question, by reason of its proviso,

is not a "law of the land" equally binding on every member of the community. The "law of the land," in the sense of the Constitution, means any law which embraces all persons who are or who may come into like situation and circumstances. *Mayor etc. of Alexandria* v. *Dearmon*, 2 Sneed, 104. Our criminal laws are all of this class, and are not obnoxious to the charge of unconstitutionality because they contain exemptions, the exemptions, equally with the law, including all members of the community who may fall within their purview. The exemption in favor of policemen and travellers from the penalties of the statutes against carrying pistols otherwise than openly in the hand, and the exemption of persons at their usual place of business, or within the limits of incorporated towns from the penalties prescribed against persons selling liquor under certain circumstances, are notable instances of such provisoes.

If there is any provision of the Constitution which can be considered as contravened by the act in question, it is art. 11 sec. 8: "The Legislature shall have no power to suspend any general law for the benefit of any particular individuals, nor to pass any law for the benefit of individuals inconsistent with the general law of the land, nor to pass any law granting any individual or individuals rights, privileges, immunities, or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law." But it is obvious that this clause of the Constitution only prohibits the suspension of a

general law, or the grant of privileges, immunities, or exemptions to an "individual" or "individuals." It does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class. The lien given to mechanics on the land upon which they have erected a building, the lien of the landlord on the growing crop of his tenants, the exemption of certain articles from legal process in favor of heads of families, and of a portion of his earnings in favor of the laborer, are instances of such legislation, about the constitutionality of which there never has been any doubt. The act under consideration was intended to prevent speculation in witness fees. It makes the purchase of such fees for less than their face value a misdemeanor, but, it is added, the provisions of the act shall not apply to witness fees traded for merchandise or hotel bills. The proviso does not authorize merchants and hotel keepers to speculate in the fees. It would be as much a misdemeanor for an individual of these classes to do so as for any other member of the community. The meaning of the proviso is that the transfer of the fees for food and lodging, or for goods in the ordinary course of trade, shall not be deemed speculating in them within the meaning of the act. The Legislature intended to break up a particular kind of speculation in these fees, which it thought detrimental to the public interest, without interfering unreasonably with the witness's right of using the fees in the ordinary course of business. Of the wisdom of the legislation, the law-making power is

the exclusive judge. Our duty is to enforce it, if not violative of the organic law.

The judgment must be affirmed.

3L 387
7L 603

RANDAL M. EWING, Adm'r, *v.* MARY MAURY *et als.*

1. ADMINISTRATION. *Insolvent Estates.* When the administrator of an estate suggests to the County Court the insolvency of the estate, the legal import of his act is that he has ascertained that the personal assets are not sufficient to satisfy all its debts, and, therefore, that the estate is to be divided ratably among the creditors; and, if the estate proves to be insolvent, the right of the creditors to share the estate ratably becomes fixed from the date of the suggestion.

2. SAME. *Same. Chancery Practice and Pleading. Creditors quasi parties.* If, under a bill filed by the administrator after a suggestion of insolvency against the widow and heirs of the intestate for a sale of realty, the administration is properly transferred to the Chancery Court, and the creditors required to file their claims, and they do file, and have the same allowed, without objection to the form in which these acts are done, the creditors thereby become *quasi* parties, with the right to be heard during the progress of the cause, and to appeal.

3. SAME. *Same. Same. Proceeds of realty sold, a trust fund.* The proceeds of land sold under the decrees in such a cause constitute a trust fund for the benefit of all the creditors ratably, which trust will follow the fund into the hands of any creditor who is a party or *quasi* party, and the trust may be enforced by the court, in a summary way, by ordering the creditor to pay the money in excess of his ratable share into the court within a given time, otherwise that execution issue.

Ewing *v.* Maury.

1. SAME. *Same. Creditor holds excess of his pro rata in trust.* Where funds thus derived from the sale of realty are ordered to be paid to the administrator, "for the purpose of paying off the indebtedness of the estate," without more, the administrator can only pay out the funds according to law, that is, ratably among all the creditors, and if he do in fact pay one creditor more than his share, the creditor will hold the excess in trust for the other creditors.

5. SAME. *Same. A surety may file claim. When.* A surety against whom judgment has been rendered may, at any time thereafter, and within two years from the payment of the money, come into a suit filed for the administration of his principal's estate as insolvent, and, before the distribution of the funds, have the amount of the judgments allowed in his favor as a claim against the estate.

FROM WILLIAMSON.

Appeal from the Chancery Court at Franklin. W. S. FLEMING, Ch.

J. G. WALLACE for complainant.

T. W. TURLEY for defendants.

COOPER, J., delivered the opinion of the court.

In this administration suit, the estate proved insufficient to pay the debts, and some of the creditors having received, during the progress of the cause, more than their *pro rata* share of the assets, the Chancellor ordered them to refund the excess. John S. Park, one of these creditors, has brought the case up by writ of error.

In the year 1864, Abram P. Maury died intestate in Williamson county, leaving a widow and two children him surviving. Randal M. Ewing, who had been appointed and qualified as administrator of the intestate's estate in 1865, filed the original bill, on

the 2d of April, 1866, making the widow and children of the decedent alone parties defendant by name. The bill stated the foregoing facts, and specified the property, real and personal, of which the intestate had died seized and possessed. One object of the bill was to have the year's allowance to the widow in the personalty, and her dower in the realty ascertained and allotted. But the bill further stated that the personal assets were wholly insufficient to meet the debts of the estate, a schedule of which as far as presented was exhibited, amounting to several thousand dollars, and that a sale of realty would be necessary to pay debts. It averred that the complainant, as administrator, had suggested the insolvency of the personal assets of the estate to the County Court, and asked, in view of this fact, that the administration be removed from the County to the Chancery Court, and that a sufficiency of the realty be sold to pay the debts. The widow filed an answer admitting the facts to be true as alleged in the bill, and consenting to the relief sought. An answer was also put in for the children by their general guardian, who was their maternal grandfather. Upon these answers the court, at the April term, 1866, rendered a decree, finding the facts to be as set out in the bill, and among other things, that the complainant had duly suggested to the County Court the insolvency of the personal estate of the intestate, and that such personalty had been exhausted in due course of administration. It was further found that the estate exceeded in value one thousand dollars, and it was ordered that the administration be transferred from

the County to the Chancery Court, with leave to the complainant, as administrator, to pay his accounts and make his settlements with the clerk of the Chancery Court. It was further "decreed by the court," that all persons having claims against said estate shall present the same duly proven within the time prescribed by law to the clerk and master of the Chancery Court, and that said administrator make publication and notify the creditors of said estate where to file said claims. The decree contained directions in relation to the widow's dower and year's allowance, which need not be noticed.

Such proceedings were had in the cause that the necessity of a sale of the realty to pay debts was made to appear to the court, and a decree was rendered directing the clerk and master to sell a sufficiency of the land to pay these debts and the expenses of administration. Such proceedings were also had that the creditors of the estate, including the appellant, John S. Parks, filed their claims, which were reported upon, and with one or two exceptions allowed.

No objection was made to the mode in which the creditors came in and presented their claims, nor is any point now made in relation thereto on behalf of the administrator or heirs. There was delay in making sales of the realty of the estate, which consisted principally of unimproved lots in the suburbs of Nashville. It turned out that the proceeds of sale fell far short of paying the debts, and no rate bill for the appropriation of these proceeds among the creditors was made until the June term, 1875.

In the meantime, on the 7th of September, 1872, a bill was filed by W. O'N. Perkins, as a creditor of the estate, against the administrator, the widow and children of the intestate, and the creditors who had filed their claims in the original suit. Perkins stated that he was the surety of the intestate on certain notes to M. F. DeGraffenreid, on which judgments had been recovered against him on the 5th of July, 1871. He further stated that he had suggested to the County Court the insolvency of the estate both real and personal, that the estate was worth more than a thousand dollars, and he asked that the administration be transferred to the Chancery Court. The appellant, Park, seems to have been made a defendant to this bill as one of the creditors, and he allowed it to be taken for confessed against him. Such proceedings were had in this cause, that the Chancellor by a decree, with proper recitals, again transferred the administration to the Chancery Court, and ordered all proper accounts. It was then consolidated or heard with the original suit, and upon a report of the master, to which no exceptions were filed, Perkins was, by decree rendered in September, 1874, declared to be a creditor of the estate to the extent of the judgments recovered against him, the decree reciting that he had paid the judgments. The claims on which these judgments were rendered had previously been filed and allowed in the name of M. F. DeGraffenreid, but perhaps for a less amount than was actually due.

On the 9th of June, 1875, a decree was rendered in both of these causes, upon the report of the master,

declaring the *pro rata* of each of the creditors of the estate, whose claims had been ascertained and allowed, in the funds on hand for distribution. The report of the master, thus confirmed without exception, further stated that it would be seen, by reference to the settlement of the administrator, and the schedules thereto, made by the administrator, that, on the 2d of December, 1867, the administrator had paid to John S. Park, the appellant, his claims against the estate in full, and on a subsequent day to another creditor his claim in full, taking from them respectively, "as he alleges," their refunding bonds to refund any excess in the payments over and above the *pro rata* which might be eventually found due upon such claims. The report also stated the amount of excess of payment on these claims. The court, after reciting these facts, directed the clerk and master to proceed at once to collect from the parties the excess thus found, or to "take judgment for the same with interest on the refunding bonds of the parties." These collections, with the funds on hand, constituted the means out of which the *pro rata* then declared was to be paid. At a subsequent day of the same term, this part of the decree was so modified as to direct execution to issue against the respective parties for the over-payments as found, unless the amount, with interest, was paid into court within ninety days from the adjournment of the then pending term. It was the execution issued against John S. Park under this decree, which was superseded by the present writ of error. If, as the record in the Perkins branch of this case

seems *prima facie* to show, and has not been disputed in argument, the appellant Park was a defendant to that suit by service of process and *pro confesso* order, it is clear he cannot call in question the claim of Perkins, allowed upon a report of the master, confirmed without exception. Besides, our decisions based upon the peculiar wording of our statutes, leave no doubt of Perkins' right to come in at any time after judgment rendered against him as surety, and within two years after the payment of the money, the assets of the estate not being distributed, and have the amount allowed against the estate of his principal. *Scott* v. *Lanham*, 8 Yer., 420; *Marshall* v. *Hudson*, 9 Yer., 57; *Maxey* v. *Carter*, 10 Yer., 521. Strictly speaking, according to these cases, the surety is not a creditor until he has paid the debt, but may proceed after judgment by virtue of the statute. And, although the same claim had been previously allowed in the name of DeGraffenreid, the creditor, yet the demand, as ascertained by the judgments, seems to have been for a larger amount. Where a party is entitled to more extensive relief than he can procure in the administration suit under the usual decree, he may be permitted to file a new bill as supplementary to the former suit. *Brooks* v. *Gibbons*, 4 Paige, 377 *Shepherd* v. *Towgood*, T. & R., 379. It is probable, that the additional relief might, under our statute, be obtained by petition in the original cause. But no objection was made to the form in which Perkins chose to assert his claim.

The new bill seems to have been resorted to under

the impression that the suggestion of insolvency in the County Court ought to show that the estate was insolvent both as to the realty and personalty, the suggestion on which the bill of the administrator was filed being only of the insolvency of the personal estate. The same impression appears in the petition of the appellant for a writ of error. Such an impression is not warranted either by the statute, or the decisions of this court. The statute requires the personal representative to make the suggestion of insolvency whenever he ascertains "that the estate committed to his charge is insolvent." Code, section 2328. The estate committed to his charge consists of the personal effects, for he has nothing to do with the realty by virtue of his office of administrator. When an administrator suggests to the County Court the insolvency of an estate, the legal import of the act is, that he has ascertained that the personal assets are not sufficient to satisfy all of its debts, and therefore, that the estate is to be divided ratably among the creditors. *Fleming* v. *Taliaferro*, 4 Heis., 352; *Norville* v. *Coble*, 1 Lea, 465. And a bill in chancery may be filed at any time after the estate is reported insolvent to the County Court. Code, section 2366. From the date of suggestion, the right of the creditors to share the estate ratably becomes fixed. Code, sections 2326, 2389. That right is not made to depend upon the uncertain contingency of the insufficiency of the realty. The bill of the administrator was, therefore, sufficient to secure equality of rights among the creditors, after the suggestion of insolvency in the County Court. All

the facts necessary to give the court of chancery jurisdiction in such cases was averred and found, and the administration regularly transferred to the Chancery Court.

In other respects, the bill seems to have been framed with a view to the provisions of the Code, section 2267 *et sequente.* But under those provisions, as well as under the provisions of the Code regulating the administration of insolvent estates in the Chancery Court, (Code, section 2362 *et seq.*), all the creditors have the right to come in under the bill and share all the assets ratably. *Dulles* v. *Read*, 6 Yer., 53. And if all parties acquiesce in allowing the creditors to come in and file their claims, however informally, and have them acted on, it is sufficient, and the creditors become *quasi* parties according to the English rule of chancery practice, and are thereby bound by the proceedings, and have the right of hearing during the progress of the cause, and of appeal. *Caruthers* v. *Caruthers*, 2 Lea, 264; Dan. Ch. Pr., 635, 1491, 1591. There can be no doubt, therefore, that the appellant was a party to the original cause so far as to render the decrees and proceedings conclusive upon him, unless reversible for error on appeal taken in due time.

The errors relied on are in the allowance of the Perkins claim, already considered, and in the decree against the appellant for the over-payment.

The suggestion of the insolvency of the estate, the estate proving actually insolvent, fixed the right of every creditor to a ratable share of the estate, and,

e converso, necessarily deprived every creditor of the right to more than that rátable share. The record shows, and the fact is not disputed, that the administrator did, on the 2d day of December, 1867, pay to the appellant the full amount of his claim. This was done under the belief, at that time entertained by all parties, that, although the estate was insolvent as to the personalty, the realty would sell for more than enough to pay all the debts. If now the payment had been made with the express agreement that the creditor should refund if it should eventually be found that he was not entitled to his debt in full, such an agreement would be sustained by the consideration of the payment, and would be binding. The final decree complained of recites that the administrator made such an agreement, and took from the appellant a bond conditioned to refund the excess. The argument is, that the recital of the decree is not sustained by the facts in evidence, the report of the master only stating that the administrator had taken such a bond "as he alleged." At a previous term of the court, the master, in pursuance of a decretal order to that effect, reported that he had taken and stated an account with the administrator, a summary of which is embodied in the report, and all the items of which, debit and credit, are given in a schedule appended to the report. Among the credits thus allowed to the administrator are the payments made to the appellant, on the 2d of December, 1867, in full of his claims. The master further reports as follows: "The administrator took from John S. Park, at the time of the

payment made to him, his obligation to refund whatever portion might be necessary in the event the estate should prove insolvent." This report was on the 5th of October, 1871, in all respects confirmed, no exceptions by any party having been filed to it. If, therefore, the rights of the appellant depend upon a positive statement by the clerk of the fact that the administrator had taken a refunding bond, here we have that fact in a report not excepted to by him. The real doubt, however, though not urged in argument, is, whether the recital was within the purview of the reference under which the report was made.

Be this as it may, the fact is beyond dispute that the appellant received during the progress of the suit, to which he had become a *quasi* party by filing his claim and having it allowed, more than he was ratably entitled to out of the assets of the estate. These assets were obtained by a sale of lands belonging to the heirs, and constituted a fund in the custody of the court in trust for the creditors ratably. Every creditor, and every party to the suit who received any portion of this fund, unless paid to him by order of the court, would receive it coupled with the trust. There is no order of court directing the fund in controversy to be paid to the appellant on his claim or otherwise. There is no order of court for the payment of any portion of the assets *pro rata* or otherwise to the creditors. No rate bill, and no dividend was ever made until the June term, 1875. The appellant has obtained in some way more than his share of these trust moneys. The power of the court, in

a summary way, to compel a party who has obtained possession of its funds without authority, to restore the same, can scarcely be doubted. *Burchard* v. *Phillips*, 1 Paige, 67.

The record shows that in December, 1866, when the first sales were reported, the court ordered the master to "pay the cash received, and the proceeds of the notes when collected, to the administrator for the purpose of paying off the indebtedness of the intestate's estate." The same order is repeated at the October term, 1867, touching the share of the estate in the proceeds of the sale of the land in Gibson and Dyer counties. Afterwards, the master was directed to loan the money on hand.

The payments of the appellant were made to him by the administrator out of the funds thus received. He received the money for the purpose of "paying off" the debts of the estate. In the absence of positive instructions by the court, these payments could only be properly made according to law, that is, ratably among all the creditors. The administrator himself, and any party to the suit who received from him any portion of these funds beyond what he was entitled to, would hold the funds subject to the trust for all the creditors. The power of the court to make a party to the suit account therefor, is too clear for argument. This is what the court of chancery undertook to do by the decrees of the June term, 1875. The amount with which the appellant was chargeable having been ascertained, the court ordered him to pay it in within a given time, and on failure, that exe-

cution issue. There is no judgment upon a refunding bond, and, therefore, the arguments of the learned counsel, based upon this hypothesis, need not be considered.

It need scarcely be added, that a receipt of trust funds by a party to the suit would not, without an order of court, be a satisfaction of the debt, nor dissolve the creditor's connection with the case.

There is no error in the decrees complained of, and they will be affirmed with costs.

3L 393
2pi 359

3L 393
117 379

THOMAS MERRIMAN *v.* THE STATE.

EVIDENCE. *Impeaching witnesses confined to general character.* It is error to permit an impeaching witness, over the objection of the opposite party, and, on direct examination, to prove as a fact that a female witness, sought to be impeached, had had bastard negro children.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. J. M. QUARLES, J.

W. G. BRIEN, Sr., for Merriman.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

Thomas Merriman, the plaintiff in error, having been convicted of murder in the second degree, and sentenced to ten years' confinement in the penitentiary, has appealed in error.

On the trial, the State introduced only one witness who was present at the killing. The defendant, in order to break the force of the testimony, examined a woman who testified that in a conversation held by her with the witness on the night after the alleged murder, the witness said to her that he did not see the killing. The State, in rebuttal, produced several witnesses who were permitted, over the objections of the defendant, to testify that the female witness was a woman of bad character, unworthy of credit, and that she had had bastard negro children. This is assigned as error.

In this State, it is settled that the inquiry into the credibility of a witness involves the whole moral character, and that the proper interrogatories are, whether the witness knows the general reputation of the person whose credibility is in question, what that reputation is, and whether, from such knowledge, the witness would believe that person on oath. *Ford* v. *Ford*, 7 Hum., 92; *Gilliam* v. *State*, 1 Head, 38. The other party may cross-examine the witness as to his means of knowledge, and the grounds of his opinion. The examination must be confined to general reputation, and must not be permitted as to particular facts, for every man is supposed to be capable of sup-

porting the one, while he could not be expected to answer the other without notice. 1 Gr. Ev., sec. 461. There has been some doubt whether evidence of common prostitution was not admissible to impeach a female witness. In an early case in Massachusetts, the witness was permitted to be attacked by proving that she was notoriously a prostitute, and the mother of bastard children. *Commonwealth* v. *Murphy*, 14 Mass., 387. In the notes to 1 Phil. on Ev., the learned annotators speak of this decision as entirely anomalous. Note 531. And it has been expressly overruled by the same court in *Commonwealth* v. *Churchill*, 11 Met., 538. Unchaste character has been considered admissible in one State (*Evans* v. *Smith*, 5 Mon., 363), and inadmissible in another, (*Spears* v. *Forrest*, 15 Verm., 435.) The sounder rule is to confine the impeaching examination in chief to the general interrogatories, leaving the other party to inquire into the witness' means of knowledge and grounds of opinion, if he sees proper.

The court erred in allowing the impeaching witnesses, over the objection of the defendant, to prove as a fact, on their direct examination, that the witness sought to be impeached had had bastard negro children, and for this error the judgment must be reversed, and the cause remanded for a new trial. It is not necessary to consider the other assignments of error.

WILLIAM DERRICK *et als.* *v.* THE STATE.

SUMMARY PROCEEDINGS. *Motion against securities on Trustee's bond, after death of principal.* Under the Code, section 735, a motion for the official default of the County Trustee as a revenue collector, will lie by the State against the sureties on his bond, where the Trustee dies before the motion is made or notice given.

FROM CUMBERLAND.

Appeal in error from the Circuit Court of Cumberland county. D. K. YOUNG, J.

D. L. SNODGRASS for Derrick.

ATTORNEY-GENERAL LEA and JNO. FRIZZELL for the State.

COOPER, J., delivered the opinion of the court.

J. P. Hamby was elected trustee of Cumberland county at the August election, 1876, and on the 4th of September, 1876, he gave the required official bond, with the plaintiffs in error as his sureties, and entered upon the discharge of the duties of his office. At the April term, 1877, of the County Court, he renewed his bond with, so far as appears, the same sureties, in compliance with the provisions of the act of 1877, ch. 3, extending the time for the collection of the taxes for the year 1876, and shortly thereafter died. At the December term, 1878, of the Circuit Court of Cumberland county, a motion was entered of record

by the State against the plaintiffs in error, as sureties on said bond, for the failure of their principal to pay over a given sum of State revenue for the year 1876. The motion was based on a formal notice given to the plaintiffs in error five days before the commencement of the term. At the April term, 1879, the plaintiffs in error appeared, and continued the cause on affidavit. At the August term, 1879, judgment was rendered against them and in favor of the State for the amount specified in the notice, with interest and damages. No pleas were filed to the action, nor was any defense made on the trial, except to the introduction of evidence by the State upon the ground that the trustee, their principal, was not notified, and moved against with them. They made out a bill of exceptions and appealed in error. It seems, although the fact does not appear in the transcript before us, that there was a preliminary motion to dismiss the proceeding upon the same grounds of defense made at the hearing, which motion was overruled by the Circuit Judge. The correctness of his action must depend upon the conclusion to which we may come as to the validity of the defense relied on.

The principal ground now relied upon for reversal is, that the summary proceedings by motion will not lie against the sureties alone without the principal. Under the statutes upon this subject, which were brought into the Code, section 3583 *et seq.*, it was held that the motion would only lie against all of the parties against whom it was jointly given, and, therefore, where the statute allowed the motion against the prin-

cipal and his sureties, it could not be made against the sureties alone. *Houston* v. *Dougherty*, 4 Hum., 505. And, although the ruling was modified where any of the sureties died so as to permit the motion against the survivors, the modification was, in the case cited, held not to apply to the death of the principal. Under the wording of the Code, section 3583, the same rule would probably still prevail, except where it is otherwise expressly provided. *Prowell* v. *Fowlkes*, 5 Baxt., 649. The Code, section 730, is: "Any officer concerned in the collection of revenue who has failed to collect, make returns or settlement, or pay over money of the State by him received, at the time and in the manner required by law, may be proceeded against summarily on motion in the Circuit Court, by the proper law officer of the State, pursuant to the instructions of the Comptroller." Then follow some provisions touching the evidence and judgment in such cases, after which is section 735: "If the delinquent, or either of his sureties, has died before the motion is made, the court shall give judgment against the sureties alone in case of the death of the principal, or against the principal and surviving sureties on the bond in case of the death of either of the sureties."

It has been ingeniously and ably argued by the learned counsel for the plaintiffs in error, that this provision of the Code only applies where the motion has been made, or the notice given to the principal. But the Code says, "if the delinquent die before the motion is made." And the wording of the act of 1840, ch. 160, sec. 13, from which this provision of

the Code is taken, leaves no room for doubt as to the legislative meaning. It says: "That in all cases where a sheriff, or other collector of the public revenue, or either of his securities, may have died before motion is made for any neglect or omission of payment on the revenue bond, it shall be the duty of the court to give judgment on motion against the sureties alone, in case of the death of the principal, or against all the survivors on the bond in case of the death of any or either of the sureties, in the same manner, and with the same effect as if given against the principal and all of the sureties, as now provided for by law."

It is obvious that the Legislature intended to take the bonds of revenue collectors out of the ordinary rule, and to give the State the summary remedy in all contingencies. And the service of notice is, when made by the Attorney General in a State case, the beginning of the suit. *State* v. *Dail*, 3 Heis., 272; *Young* v. *Hare*, 11 Hum., 303.

It is also argued, that the act of 1875, ch. 91, abolished the office of revenue collector, and transferred his duties to the county trustee; that the provision of the Code, seetion 735, applied to the old officers, and cannot be extended by construction to the county trustee. But the language of section 730 is: "Any officer concerned in the collection of revenue," may be proceeded against summarily on motion. The provision is general and applicable not to the "revenue collector" as a specific officer, but to any officer entrusted at any time with the collection of revenue. By whatever name he may be called, he and his sure-

ties fall within the law if he be "concerned in the collection of revenue." And such a general law applies to officers subsequently created as well as to those in existence.

A further point on behalf of the plaintiffs in error has been suggested rather than argued, and that is, that they have been released by the act of 1877, ch. 3, extending the time in which to collect the taxes assessed for the year 1876. But the Circuit Judge found as a fact that the trustee and the plaintiffs in error as his sureties, appeared at the April term, 1877, of the County Court, and acknowledged their liability anew as required by the second section of that act. The bill of exceptions shows that the clerk of the County Court produced and proved the records of the County Court and read therefrom "the several bonds executed by said Hamby as trustee at the April term, 1877," and the bonds in the bill of exceptions, purporting to be thus read from the minutes of that court, are the identical bonds originally given by the trustee.

The defendants introduced the chairman of the County Court as a witness, who proves that Hamby "executed the bonds set forth on the minutes of the court as renewal bonds as trustee, under the act of 1877." It is true that both he and another witness introduced by the defendants depose that the latter was also one of Hamby's sureties. But the fact does not so appear from the record or bonds. It is probable that the witness went with the plaintiffs in error before the County Court, intending to become a surety, but neglected to sign the bonds. Be this as it may,

the finding of the Circuit Judge was warranted by the evidence.

There is no error in the judgment, and it will be affirmed.

3L 401
16L 248
16L 412
16L 692
4pl 1

In the Matter of W. A. Knight *Ex parte.*

1. Appeal. *Will not lie from action of Circuit Judge requiring County Trustee to give new bond or vacating the office. Not a judicial proceeding.* The action of a circuit judge, under sec. 778 of the Code, based upon the report of a grand jury, requiring a county trustee to give new bond, and declaring his office vacant because, in the opinion of the judge, the sureties to the bond, tendered in compliance with the order, are not good for the amount, is not a judicial proceeding from which an appeal or writ of error lies directly to the Supreme Court.

2. Void Proceedings. *Remedy by certiorari. Dicta* per McFarland, J. If the proceeding be such a departure from the provisions of the statute as to render it void, the remedy is by *certiorari* from the circuit court; but if the proceeding is merely erroneous, there is no remedy.

FROM DAVIDSON.

Writ of error to the Circuit Court of Davidson county. Frank T. Reid, J.

W. A. Thoma, Geo. Maney, John Frizzell, E. H. East and W. A. Glenn for Knight.

Attorney-General Lea for the State.

MALONE & DEMOSS for the county.

MCFARLAND, J., delivered the opinion of the court.

On the 18th of June, 1879, W. H. Washington, District Attorney-General, presented to the Hon. Frank T. Ried, Judge of the 8th Judicial Circuit, then holding the Circuit Court at Nashville, the report of the Grand Jury of Davidson county in regard to the bonds of the county officers, and also produced the bonds of W. A. Knight, Trustee, and moved that said Knight be required to give other bonds, or that his office be declared vacant. An order was at once made and entered upon the minutes of the court for a subpœna to issue summoning said Knight to appear before the judge at 10 o'clock A. M., June 19, "then and there to enter into bond and surety according to law, or show cause why his office should not be declared vacant."

On the day named (the 19th) Judge Reid was sick, but on the 20th said Knight appeared, and the motion was heard and a further order was made and entered upon the minutes of the court in which it is recited "that it appearing to the court that the four bonds purporting to have been made by W. A. Knight on the 1st day of March, 1879, from examination and inspection, and from the report of the grand jury (the said bonds having been filed before the court for examination and inspection according to law), and said report of the grand jury having been brought before the court by the Attorney-General, that they are irregular, have not been taken according to law, and

are insufficient in amount," it is ordered that said Knight be granted until July the 1st to give new and additional bonds, and if he fail to appear before the judge at the court house on or before that day and execute the required bonds, the office to be declared vacant. The amounts of the several bonds were specified in the order. It was ordered that Knight have notice of the order above set forth, and a copy thereof was issued and served upon him the same day.

On the 20th of June Knight appeared in court and presented his bill of exceptions to the action taken upon the 20th, in which the proceedings had upon that day are set forth, and the report of the grand jury made a part thereof, and it is further shown that Knight made a general objection to the reading of said report, but his objection was overruled. He then moved the court to be permitted to justify the sufficiency of the existing bonds, but the motion was overruled. The bill of exceptions was signed.

On the 1st day of July (the day named for Knight to give additional bonds) he appeared and tendered the four several bonds required by law, signed by himself and a number of sureties. At the same time the affidavits or depositions of Knight and his sureties as to their solvency were presented, and the judge, of his own motion, took the affidavits of several real estate agents as to the value of certain real estate owned by the sureties. To the consideration of the latter Knight excepted upon the ground that no notice or opportunity to cross-examine was given him, but the objection was overruled.

W. A. Knight *Ex parte.*

These proceedings seem to have occupied the time until the next day (the 2d of July), when the matter was taken under advisement. On the 5th the judge delivered a written opinion, in which he held that the sureties on the bonds tendered were insufficient, and declared the office vacant, and ordered that the county court be notified of his action. At the same time he made an order correcting all former orders so as to insert the name of "Hon. Frank T. Ried" in the place of the words "the court," wherever these words were used, so as to show that the proceedings were had not before the circuit court, but before Judge Reid in person. On the 7th of July Knight appeared before Reid and asked leave to make a motion in the matter, and thereupon moved to be allowed until July the 10th in which to give other sureties and complete the sufficiency of his bonds, but the motion was refused. On the 8th of July he again appeared and presented the affidavits of certain persons who proposed to go upon the bonds, together with his petition, asking to add their names so as to make the bonds good, but Judge Reid, being of opinion he had no power to receive the application, denied the motion. Knight then presented his bill of exceptions, which was signed as a correct, or as it elsewhere expressed, a "pretty correct history of what took place," the judge being of opinion, however, that it was not a case for a bill of exceptions. Knight then prayed an appeal to this court, which was refused. He then moved to have the whole proceeding reformed and annulled, which was also refused. There-

upon Knight presented his petition, accompanied by a transcript of the foregoing proceedings, to one of the judges of this court, praying for a mandamus to compel Judge Reid to accept the bonds tendered, or in the alternative, for writs of error and *supersedeas*. The latter writs were granted (the judge to whom the application was made being of opinion that the questions presented were worthy of consideration by a full court), and the enforcement of the order of Judge Ried has been superseded. A motion has been made to discharge the writs as improperly granted, and the cause, upon its merits, has been advanced and heard at the same time.

The errors assigned in the petition and in argument are numerous. The act of 1879, ch. 9, extends the time previously allowed tax payers to make voluntary payment, and upon the supposition that this extension might release the sureties of the trustees, such being the purport of the case of *Johnson* v. *Hacker*, 8 Heis., —, it is provided that unless the sureties appear and acknowledge their willingness to continue bound, a new bond shall be given on or before the first Monday of March, 1879, and in default of this the office should be declared vacant.

The bonds which Judge Reid in his first order declared insufficient were those given by Knight in compliance with this act (though the report of the grand jury, as we understand it, was not confined to these bonds). The first error assigned is, that the above act of 1879 is unconstitutional; 2d, that the judge erred in receiving and acting upon the report

of the grand jury because it was addressed to Judge Quarles, of the criminal court; 3d, in refusing to permit Knight to show that his bonds were sufficient, notwithstanding the report of the grand jury; 4th, that by the law Knight had ten days from the first day of July (the day on which he was ordered to give the bond) in which to complete them; 5th, that the judge erred in considering the *ex parte* affidavits of the real estate agents as to the solvency of the sureties offered, and in determining the sureties insufficient; that the whole proceeding was a departure from the law, and void; that neither the circuit court or circuit judge had any jurisdiction of the matter. On the other hand, it is argued that this court has no jurisdiction by appeal, writ of error, or otherwise, to review the proceedings before Judge Reid, and consequently no power to supersede his orders. The solution of this latter question depends upon the nature and character of the proceedings to be reviewed. If the proceeding was a judicial one before the circuit court of Davidson county in the ordinary mode in which actions at law are conducted, then it is not denied that an appeal or writ of error would lie to this court for the correction of errors. If, on the other hand, Judge Reid acted only as the ministerial officer or agent of the State, then it is contended that this court has no revisory power over his action; or even if it be conceded that the proceeding was of a judicial nature, yet it is contended that it was a proceeding not before the circuit court as such, but before Judge Reid as a special statutory tribunal, con-

stituted for the purpose of determining matters of this character, and his decision was intended to be final. The duty of taking bonds from collectors of the public revenue is, by law, in the first instance, devolved upon the county court, and such officers are required to enter in the several bonds required by law with sureties satisfactory to that tribunal. Code, secs. 492–599. By the act of 1875, ch. 91, the office of revenue collector is abolished, and the duty of these officers devolved upon the county trustees, to be performed in a manner therein pointed out, and the trustees are required to enter into the bonds previously required of the tax collectors. By secs. 725–727 of the Code it is made the duty of the clerk of the county court to produce before the judge of the circuit court at the first term after the bonds are executed, the bonds of all officers taken in that year, and it is made the duty of the circuit judge to examine them, and if, in his opinion, they have been taken according to law, he shall write upon them, "examined and approved," and sign his name thereto. If the judge be of opinion that the bonds have not been taken according to law, a subpœna is to issue for the officer to appear before the judge immediately and enter into bond and security, and if he fail to do so the office is to be declared vacant, and another election held in twenty days.

By sec. 5079 of the Code it is made the special duty of the grand jury to inquire into the condition of the bonds of all county officers with regard to their correctness and sufficiency; and by sec. 778 *et seq.*, it

is provided that all public officers who are compelled to give official bonds may be required by the court or officer whose duty it is to take or approve such bonds, to give additional security or new bonds," in certain cases among others, "where the grand jury or a majority thereof certify the insufficiency of the original bond." It has been argued that this last named section was intended to give the power to require new bonds to the county courts, and not to the circuit judge, but it was held to apply to the circuit judge in the case of *ex parte Wickersham*, 6 Col., 333, and as we have seen that by sec. 725, *et seq.*, the circuit judge is the officer required to approve such bonds. The construction given in the Wickersham case is within the letter of sec. 778.

Judge Reid proceeded to act in the present case under the provisions of said last named section, upon the report of the grand jury, and the question is, was the proceeding a judicial one before the circuit court according to the course of the common law? The fact that the motion was made before Judge Reid while sitting in open court, and that his orders were entered upon the minutes of the court, is to my mind not material. If the power conferred upon him was ministerial in its nature he could not make it judicial by the manner of its performance, nor could he in any wise change the nature of his powers or his acts with respect to their force and effect by discharging the duty in open court, or entering upon the minutes of the court the orders made by him. The powers conferred upon the circuit judge by the sections of the

Code referred to are similar in their nature to the powers exercised by the county court in taking the bonds in the first instance. He must determine the proper legal form and terms of the bonds and the sufficiency of the sureties. He is the agent or officer of the State with whom the trustee and his sureties enter into their obligations. He accepts the bonds upon behalf of the State, or refuscs to accept them if not satisfactory, in which event the law declares the office vacant.

To my mind it is not very material whether the sections of the Code in question be regarded as conferring the power upon the circuit judge or upon the circuit court. The nature of the power does not depend upon this. We have seen the duty of taking the bonds in the first instance is conferred upon the county court in terms. This does not change the nature of the duty or the effect of the act when performed. If it were conceded that sec. 778 confers the power upon the circuit court instead of the judge, it by no means follows that the act, when performed, becomes a judicial proceeding subject to review in this court, as powers merely ministerial, or at least not judicial, may be conferred upon the circuit court. See *Ex parte Gray*, 9 Hum., 513; 8 Hum., 634; *Carey* v. *Justices*, 5 Sneed, 515; 3 Baxter, 362. But it seems manifest to my mind that it was intended to confer the power upon the circuit judge, not upon the court.

Secs. 779, *et seq.*, point out the mode of the proceeding. The requisition to give the additional bond

is to be in writing, and is to specify the time and place when the officer shall appear and give the bond. If a proceeding in the circuit court were contemplated it could not take place elsewhere than at the court house, nor at any other time than during a term of court. Nor is any mode of proceeding pointed out making it analogous to a judicial proceeding according to the course of the common law. But aside from this the very nature of the proceeding precludes the idea of its being reviewed for the correction of errors as judicial proceedings are reviewed.

It can hardly be contended that an appeal would lie from the refusal of the county court to accept the bonds in the first instance, either because in the opinion of that tribunal the bonds were not in proper form, or because the sureties were insufficient, and that such appeal would take the course of other judicial proceedings. If so, the entire term of the office might be occupied in a litigation over the question of the form of the bond or the solvency of the sureties. If the taking the bonds of a public officer is to assume the shape of an ordinary suit at law, then endless delay and confusion would result. There would be no one in a position to rightfully exercise the functions of the office, the revenue would remain uncollected, and the public suffer irreparable injury. Again, after the bonds are accepted by the county court, as we have seen, it is made the duty of the clerk of the county court to produce them before the circuit judge at the first term of the court held in the county after the bonds are taken, and it is made the duty of the

judge to examine them, and if, in his opinion, they have been taken according to law, he shall write upon them, "examined and approved," and sign his name thereto. But if not taken according to law, a subpœna is to issue instanter requiring the officer to appear before the judge immediately and enter into bond and security according to law, and if the officer fail or refuse to do so, the judge is to declare the office vacant, and another election is to be held in twenty days, and the bonds of the new officer to be thus elected are subject to the same proceedings. See secs. 725, *et seq.*

Now, it seems to me clear that the action of a circuit judge, under these sections of the Code, cannot be a subject of review upon appeal. The bonds are to be presented to him, it is true, on the second day of the first term of the circuit court, because, as may be fairly inferred, this is the time the judge is certain to be found in the county, and probably the first time, as but few of the counties have a circuit judge residing within their limits. The circuit judge is selected to discharge this duty because of his legal knowledge, but although the duty is to be performed on the second day of the term, yet there is no requirement that the act is to be performed in open court, the officer is to have no notice of the proceeding in the first instance, and the records of the circuit court are not required to show any of the proceedings, in fact any entry upon the records of the court would be wholly superfluous and nugatory. If the judge finds the bonds to have been legally taken, he

is to write upon them, "examined and approved," and sign his name thereto. Otherwise, he is to take new bonds or declare the office vacant. I am unable to see in this proceeding anything analogous to a suit at law, and I do not think the officer would have the right to appeal from the refusal of the circuit judge to write "examined and approved" upon the bonds and sign his name thereto. This duty is left to the judge, and his action was intended to be final—no one else is authorized to perform it. And in the event the judge refused to approve the bonds, and new bonds are offered and refused because, in the opinion of the judge, the sureties are insufficient, I do not think the officer could appeal and review the decision of the judge upon this question of fact as other strictly judicial proceedings are reviewed. I do not perceive any difference in principle between an attempt to review the action of the county court in refusing the bonds in the first instance, or the action of the circuit judge in refusing to approve the bonds or accept new bonds under the secs. 725 *et seq.* above considered, and an attempt to review the action of the circuit judge acting upon the report of the grand jury under sec. 778 *et seq.* as the functions exercised by the county court and the circuit judge in each instance are in their nature similar. Without refering at length to authorities, the case of *Wade* v. *Murray*, 2 Sneed, 50, furnishes strong authority for this conclusion. That was a contest over an election for District Attorney-General, which the law provided should be heard and determined by the Chancellor of the di-

vision. In that instance the case was heard and determined by a special chancellor appointed by the Governor upon the certificate of the regular chancellor of his physical disability. An appeal in error was prayed and granted to this court upon assumed error of law. It will be seen that the case was a much stronger one for the exercise of revisory power than the present, as the action of the chancellor certainly partook of a judicial character. This court, however, dismissed the writ of error upon the ground that the power to decide the contest was not conferred upon the chancery court but upon the chancellor as a special statutory tribunal, and no provision having been made for an appeal or writ of error, his determination of the matter was intended to be final. I understand the court to have been unanimous upon the question that no writ of error would lie from the decision of the chancellor to this court. In that case Murray had also applied to the circuit court for a *certiorari* to bring up the proceedings had before the special chancellor, which was refused, and from the refusal of the circuit court to grant the *certiorari*, an appeal in error was also prayed and granted, and this was also heard at the same time. The court was of opinion that for some purposes the *certiorari* was a proper remedy in such a case. Judge McKinney (with whom Judge Caruthers concurred), holding that it would have been a proper remedy if there had been such a substantial departure from the course of proceeding pointed out by the statute as to render the proceeding void, but that it would not lie merely to correct errors, while

upon this last point Judge Totten dissented, holding that the *certiorari* might be resorted to for the correction of mere errors in the proceeding, but I do not understand that he dissented from the proposition that a writ of error did not lie directly to this court from the decision of the special chancellor. See also the reasoning of Judge McKinney in *Cooper* v. *Summers*, 1 Sneed, 456, and Judge Cooper in *Ex parte Chadwell*, 1 Tenn. Ch. R., afterward approved by the court.

It is argued that this line of decisions may allow an officer duly elected and inducted into office to be summarily expelled without the hearing that the law guarantees to other citizens in respect to their property rights, and it is supposed that there is a distinction between the case of an officer who has been once inducted into office, and one who has merely the right to be inducted. I do not think that in this respect any distinction exists. That the officer has a property in the office is not questioned, but his right cannot be exercised except upon complying with the correlative duty of securing the public against loss of the public revenue.

All the above provisions of our statute are parts of the same system, and must be construed and enforced as a whole. The acceptance of the bonds by the county court, and the induction into office, are subject to the approval of the bonds by the circuit judge under sec. 725, and the action of the grand jury and judge under sec. 778. Otherwise, if the officer be inducted into office upon an insufficient bond,

or one that afterward becomes so, all attempts to enforce the provisions of the statutes we are considering so as to compel the giving of a new and sufficient bond, would often prove wholly nugatory. If the proceeding be regarded as a judicial one, it would be an easy matter for the officer to delay its determination until his term expires, and thus baffle all efforts to compel him to give the required security. The right of the public to security is at least equal to the right of the officer to his office, and the remedies for compelling the officer to give the proper bonds must necessarily be summary, otherwise they are utterly ineffectual. To allow these questions to be settled by the ordinary course of judicial proceedings would be subversive of the public interest. This is well illustrated by the present case. Suppose we take jurisdiction of the case and review the action of Judge Reid. We might be of opinion that he erred in admitting testimony, or in rejecting sureties offered. If for these errors we should reverse and remand the cause for further proceedings, it would be subject to all the delays incident to an ordinary trial to another review in this court. In the meantime there would be no one properly authorized or under proper bonds to collect the public revenue. The interest of the State requires that some one should be in a condition to perform this public service, and under proper bonds. For the want of it the public interests suffer—the government itself might suffer irreparable injury.

But it is asked if we are to ignore the rights of the officer. The decision against him may be arbi-

trary and unjust, he may, in fact have tendered a good bond. The question, however is, who is to decide this? There must be a tribunal whose decision of the matter is final. Is there anything in the Constitution or law imperatively demanding that this question be decided by the Supreme Court? If the law of the land has constituted some other tribunal the sole judge of this question and provided for no appeal, is it not final? When the question is decided by the tribunal whose decision the law makes final, it is as much a determination of the right according to the law of the land, in the sense of the Constitution, as if made by this court, whether this court would have decided the question the same way or not. The lawmakers no doubt properly assumed that the tribunal appointed to perform this function was as likely to decide properly as any other, and it would be very seldom that any injustice would be done an officer in refusing good bonds. But if by possibility this should be done it is better that the one individual should submit to the wrong than that still greater evils should accrue to the public by an attempt to correct the errors.

If, however, an attempt should be made to remove an officer without authority or color of law, that is, if the judge so far depart from the mode pointed out by the statute as to render his action void, then, according to the case of *Wade* v. *Murray*, 2 Sneed, —, the remedy would be by *certiorari* to quash the proceeding in the circuit court, that court having this jurisdiction. by virtue of its general re-

visory powers, over inferior tribunals. That the circuit court might be held by the same judge whose proceeding is to be acted upon, though anomalous, would not be a fatal objection.

Again, I should be of opinion that if the court or officer whose duty it is to take the bonds should refuse to act at all, that is, arbitrarily refuse to take any action, the remedy by mandamus would probably lie. If, however, such tribunal should act and determine the bonds insufficient, then a superior court could not compel the acceptance of the bond upon the ground that in its opinion the bonds were sufficient. It is possible that for a malicious refusal of a ministerial officer to accept proper bonds, an action at law might be maintained, but as to this it is unnecessary to express any definite opinion. I conclude, therefore, that the writ of error was not properly prosecuted in this case, and therefore express no opinion as to whether or not there were errors in the proceeding, further than to say that if this were regarded as a judicial proceeding, I should be inclined to agree with Judge Turney in holding that it was error to admit *ex parte* testimony, and deny to Knight the right to cross-examine the witnesses; but not regarding it as a judicial proceeding, it is not necessary to consider these questions further I think, however, the action of Judge Reid was not void. Knight was, in my opinion allowed the ten days prescribed by the statute in which to give the bonds, that is, ten days after the peremptory order was made upon him of which he had immediate notice.

I am of opinion that the writ of error should be dismissed and the *supersedeas* discharged.

TURNEY, J., delivered the following dissenting opinion:

On the 18th of June, 1879, W. H. Washington, Attorney General, moved in the Circuit Court of Davidson county, that the office of trustee for that county be declared vacant, and produced to the court the bonds of W. A. Knight, trustee, and a paper claimed to be the report of the grand jury that the bonds were irregular, informal and insufficient. A subpœna instanter was issued for Knight to appear before the Judge of the Circuit Court at 10 o'clock, A. M., June 19th. The subpœna is not in the transcript, but is shown to have been issued in pursuance of an order of record of the Circuit Court. Subpœna could have performed no office in this proceeding: 1. Because there is nothing in the law to authorize its issuance. 2. It was issued by the clerk and not signed by the Judge, as the law requires. 3. If it could at any time have been treated as the requisition, the order made on the 20th of June, and the service of a copy of the order, signed by the Judge, on Knight to appear in obedience to it, was an abandonment of the snbpœna instanter, which is no further taken notice of; the proceeding in the matter is entirely upon the requisition of 20th June, and as will be seen hereafter, the opinion of the Circuit Judge treats the requisition of 20th June as the basis of his action.

W. A. Knight *Ex parte.*

On the 19th the Judge was sick. On the 20th Knight appeared. It was ordered "that Knight be granted until the first day of July to give new and additional bonds before the Judge of the Circuit Court of Davidson county, and if he fail to do so on or before the first day of July, his said office will be declared vacant, and it is further ordered that said Knight be notified of this entry." A copy of the entry was served upon Knight.

On the 5th July, the Circuit Judge delivered an opinion declaring the office of trustee vacant.

On the trial of the motion the Attorney General read, over the objection of Knight, what purported to be a report of the grand jury, addressed to "Hon. James M. Quarles, Judge of the counties of Davidson and Rutherford," and embracing the offices of Sheriff, Chancery Court Clerk, Criminal Court Clerk, Judge of the County Court, etc.

Knight moved to be permitted to justify the sufficiency of the existing or original bonds—the motion was disallowed. To this action he tendered a bill of exceptions, which was signed on the 1st of July, the day fixed by the order of the court and requisition. Knight appeared and presented additional bonds; this tender of bonds was intended as a compliance with the act of 29th January, 1879.

His Honor, the Circuit Judge, in his opinion giving reasons for his refusal of the bonds, says: "There is not good and sufficient security provided for more than $205,132.50, or $37,867.50 less than the amount required by law to be secured; and when an exam-

ination is made of the sureties on which it is claimed that $205,132.50 is secured, it is clearly to be seen that the amount dwindles down to $150,000 or $175,-000, if not even to a less figure."

On the 7th of July, Knight moved the court to change or modify his order declaring the office vacant, and allow him until the 10th of July to increase the security and complete the sufficiency of his bonds. This was refused, and Knight excepted.

On July 8th, Knight presented his petition, with affidavits of Ament, Ensley, Sax and O'Connor, and asked to add additional security to that already given, of $103,000 to his bonds—this was refused.

On the trial, the affidavits or some statements of third persons were read as to the value of property owned by the proffered securities. Knight objected, because he had no notice of the taking, and no opportunity to cross-examine. His objection was overruled.

The proceeding is based upon sections 778, 779 and 780 of the Code, as follows: "All other public officers who are compelled to give official bonds *may* be required by the court or officer whose duty it is to take or approve such bonds, to give additional security or new bonds in the following cases: 3. When the grand jury of the county or a majority certify the insufficiency of the original bond." 779. "The requisition to give additional bonds shall in all cases be in writing and signed by the officer making it, shall state the day and place when and where the officer cited shall appear and give such bond, and a copy

thereof shall be personally served on such officer before the day specified therein." 780. "Such officer shall give the additional bond within ten days after the day specified in the requisition, and failing so to do he vacates his office, and the officer making the requisition shall at once certify the fact to the appointing power, by whom the vacancy shall be filled."

The construction of these sections involves a consideration of sections 725, 726 and 727 of the Code, to which the sections above quoted are addenda, viz:

"Sec. 725. The clerk of every County Court shall produce to the Judge of the Circuit Court for his examination, at the first Circuit Court in his county, on the 2d day of the term after the first Monday in April of each year, the bonds of all officers taken in said year by the County Court."

"Sec. 726. If, upon examination, said bonds shall in the opinion of the Judge have been taken according to law, he shall write upon them 'examined and approved,' and sign his name thereto. But if any of said bonds shall not have been taken agreeably to law, the clerk of said Circuit Court shall issue a subpœna instanter for such officer to appear before said Judge immediately with surety according to law."

"Sec. 727. If, upon service and return of said subpœna, the officer shall fail or refuse to appear and enter into bond with surety, the Judge shall declare the office vacant, and another election shall be held within twenty days thereafter."

The Circuit Judge denied an appeal, and the case is before us by writ of error and *supersedeas.*

For the State and county it is insisted this court has no jurisdiction to revise the action of the Circuit Judge—that being, it is argued, merely ministerial and not judicial.

The motion to vacate the office of trustee is a proceeding against the incumbent in that office, in which, as in other proceedings, he has the right to be heard.

The questions in the case are, first, are the bonds executed in the County Court sufficient? If this is answered in the negative, then are the bonds offered in addition to the original, sufficient with the original, to answer the requirements of the law? These questions necessarily demand investigation of law and fact. 1. Do the bonds in form and undertaking bind the parties thereto for liability for the official default of the principal? 2. Are the parties to such bonds of sufficient solvency to meet any default or neglect of the principal?

In these investigations, it cannot be denied to the officer that he has a right to be heard by himself and counsel. The hearing must be had in conformity to rules of law and evidence. The officer has the unquestionable right to confine the investigation to legal, competent and full proof, and the court or officer trying the matter has no right to depart from well-established rules of law. In *Wade* v. *Murray*, Judge Totten, in a dissenting opinion, says: "The person legally entitled to the office by a valid election, has a property in it." Knight had not only been legally elected to the office of trustee by a valid election, but had actually been inducted into it, and was in the

actual exercise and discharge of its duties. The principle announced by Judge Totten, of property in an office, is a well settled and universally recognized rule of law.

By section 8, of article 1, of our bill of rights, it is ordained: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

This ordinance is certainly broad enough to cover whatever of interest the person elected to and installed into an office may have in the office, even though a property interest were denied.

In *Jones' heirs* v. *Perry*, 10 Yer., 59, Judge Green says: "The term 'law of the land,' in the Constitution of Tennessee, means a general and public law operating equally upon every member of the community."

Judge Cooley, in his Constitutional Limitations, page 353, says: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case. By the law of the land, is most clearly intended the general law—a law which hears before it condemns; which proceeds upon *inquiry*, and renders judgment only *after trial.* The meaning is, that every citizen shall hold his life, liberty, *property* and immunities under the protection of the *general rules* which govern society. Everything which passes under the form of an enactment is not, therefore, to be considered the law of the land."

Judge Cooly adds: "The definition here given is apt and suitable as applied to judicial proceeding, which cannot be valid unless they proceed upon inquiry and render judgment only after trial." It is entirely correct also in assuming that a legislative enactment is not necessarily the law of the land. The words "the law of the land," as used in the Constitution, do not mean a statute passed for the purpose of working wrong. That construction would render the Constitution absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses, "You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

Keeping this definition in mind, we ask, Has the law heard in this case before it condemned? Have the general rules which govern society been applied? Has the law proceeded upon inquiry, and rendered judgment only after trial? Is it the law of the land that testimony, the taking of which was *ex parte*, perhaps in secret, of which taking Knight had no notice, and the right of cross-examination actually denied him, may be read in evidence against him over his objection? Would such holding be a law that hears before it condemns—a law that proceeds upon inquiry, and renders judgment only after trial? Under such proceedings has Knight been deprived of his property by

"the law of the land?" Is it the law of the land that an unauthenticated paper, without the shadow of proof as to verity—a paper containing the secret and *ex parte* action of a grand jury and mainly based, as shown upon its face, upon illegal and incompetent testimony, and merely said to be the original record of another court of record, may be read in evidence against one, over his earnest objection? Is it the law of the land that the bonds of Knight should have been held insufficient without proof; and that, too, when he was asking to show their sufficiency by proof? Is it the law of the land that a judge or court may arbitrarily decide that additional bonds shall be given to a fixed amount, without inquiry into the sufficiency of the existing bonds, to see whether they are sufficient or not; and if insufficient, to see to what extent and amount additional bonds shall be required? Is it the law of the land that the Circuit Judge may, by force of the statutes under which this proceeding is had, totally ignore, without inquiry or examination, the original bonds of Knight, and require him to execute additional bonds for the full amount of the penalty?

All these things have been done here, and the questions are distinctly and prominently made by the record in this case, and involve rights that should not be frittered away by construction. It is said, however, that the circuit judge was only the ministerial agent of the State and county, that his acts were not judicial, and therefore not subject to revision by this court. To support this theory several Tennessee au-

thorities are relied upon. First, in the matter of E. Wickersham, trustee, etc., 6 Col., 335. The trustee was regularly notified to appear as the statute directs. He did appear on the 27th of June, the day *specified*, when he asked and obtained time till the 7th of July (ten days), when he failed to appear. The court declared the office vacant, and certified to the county commissioners. This was a strict and literal pursuance of the statute. He had been duly summoned, the day distinctly *specified*, he appeared and asked and obtained from the court the entire time allowed him by law to execute bond, and then failed to appear. Of course the statute having been pursued by the court, and he wholly failing to appear on the last day named by law, as he had himself appointed, judgment by default was pronounced against him, and this would be so in any cause. It was according to the usual course of the court as prescribed by the "law of the land."

In the case of *Thompson* v. *The Justices*, the sheriff elect refused to produce vouchers that he had accounted for and paid all State and county taxes that before that time he was bound to account for and pay, and the securities on his bond were deemed insufficient, and having refused to justify, the justices refused to induct Thompson into office. The action of the justices strictly accorded with the requirements of the law. They offered to do just what the law demanded. Thompson defied it, and positively refused to comply with any of its provisions. Not so with

Knight, he proposed to do all the law imposed upon him to do.

The case of Gray, 9 Hum., 514, presents simply a question of police regulation, to be exercised by county courts in their discretion, permitting or refusing to permit free negroes to remain in the county.

In *Wade* v. *Murray*, 2 Sneed, 52, Judge McKinney holds that no relief could be granted, and says that there is a special tribunal created for the trial of contested election cases, of which the person holding the office of chancellor is constituted judge; that the tribunal was so constituted as to reasonably justify the presumption that its decisions would do equal and impartial justice according to the law of the land, and therefore ought to be satisfactory to the parties. "And no doubt the framers of the law thought it better that an erroneous decision upon the facts or law should be submitted to by a *single unsuccessful aspirant* than that the public should be subject to the great inconvenience and mischief of leaving the administration of justice suspended or impeded by a protracted litigation in the different courts. For this reason we suppose the Legislature deemed it proper the summary decisions of the chancellor should be conclusive."

The case before us does not present a similar state of facts in any particular. That the court misconstrued the intention of the Legislature in holding that it intended to make the summary proceeding before the chancellor conclusive, is made manifest by the act of the next Legislature giving the right of appeal to either party in such cases. The Wade and Murray

case was decided at the December term, 1854, and the act referred to passed in 1855. The case before us does not present a similar state of facts in any particular. The contested election was a proceeding to ascertain the vote and will of the people, and therefore political; the contest was between claimants over adverse claims to the right of property in the office. In this case the will of the people had been ascertained and settled by the proper authorities created by law for the purpose, and the relation of Knight to the proceeding is that of a defense of a right actually vested in him. A contested election has the effect of hindering for the time the organization of the State or county government; it produces a hitch in its machinery, and suspends the operation of its functions. Knight is not an unsuccessful aspirant, asking to contest the claim of his adversary to an election. He had, beyond question, the legal right to and possession of the office at the institution of the proceedings, and no one is controverting that right and legal possession. In his case the public is in no danger of being subjected to the great inconvenience and mischief of having the administration of justice suspended or impeded by protracted litigations, for the reason that being already inducted into the office he can go on in the discharge of its duties until the litigation is ended, the only possible interest the public can have in the matter being that its revenues are protected during the litigation, and it is not only in the power, but is the positive duty of the courts to see that the public revenues are protected by sufficient bonds, as was done

in this case, and of these bonds no complaint has been made. Besides, there can be no protracted litigation, as the law makes it the duty of courts to advance upon the dockets causes of this character without regard to the time of filing. In the case of the contested election, so long as the contest lasts the office is vacant, and during the time mischief and inconvenience, suggested by Judge McKinney, might arise and continue. In that case no property in the office had attached, the right to the office was the subject matter of litigation. Here the right to and property in the office are not contested, nor even denied. In the Attorney-General case there was no attempt to evict, but an effort to defeat an entrance. Here the purpose of the litigation is to evict an acknowledged rightful tenant by virtue of election and induction. Suppose, in the Attorney-General case, the officer had been inducted into the office and taken upon himself the discharge of its duties, and the proceedings had been instituted against him to oust him from the office, could it be holden that the action of the chancellor, or of any inferior tribunal, would be final. Take a case arising under our statutes making a misdemeanor (drunkenness for example) a forfeiture of the office, could we hold the verdict and judgment of the jury and inferior court final and conclusive against the accused? Certainly not. The examples put and the case at bar involve the questions of forfeiture of office, the inconvenience and mischief to the public are equal and the same. I can see no substantial ground of difference or distinction when we come to apply

the law. The public has certainly as much interest in being rid of a drunken judge or attorney-general as it can have in getting rid of a trustee whose bonds, to say the worst of them, are merely questionable as to sufficiency and solvency, and the argument of inconvenience applies with quite as much force. It is admitted that Knight is not without remedy if the judge has departed from the law in his action. That, as said by Judge McKinney in the Wade and Murray case, "in a case showing such a substantial departure from the course of proceeding prescribed in the statute as would render the proceedings void, the *certiorari* would be the proper remedy." And it is here now insisted that Knight's only remedy, if he had any, was by *certiorari* to the circuit court. To so hold we must determine that the circuit court is a superior tribunal to the circuit judge, and that an act officially performed by the circuit judge as such may be removed by the writ of *certiorari* from the circuit judge to the circuit court, presided over by the identical circuit judge whose act is complained of. In other words, that Hon. Frank T. Reid, circuit court, may revise the action and rulings of Hon. Frank T. Reid, Judge of the Circuit Court, both being done in an official capacity. This, to say the least of it, would be a curious anomaly in the machinery of judicature.

While, as above recited, Judge McKinney does say the *certiorari* would be the proper remedy, he must be understood as speaking in reference to the facts of the case he puts, and the jurisdiction of the court

arising upon these facts. He cannot be understood as holding that to be the only remedy under all circumstances. It is also admitted that if Judge Reed had, without doing more, refused to accept sufficient bonds when offered, he might have been compelled by mandamus. If this be so, as it clearly is, why then, if the facts be as claimed, that his Honor the Circuit Judge not only refused to accept sufficient bonds, but went further and declared the office vacant, and certified to the appointing power, and thereby destroyed the utility of a mandamus, does the double error destroy all right to redress and cut Knight off from all means of correcting errors? Certainly such things cannot be. It must naturally and legitimately result that Knight, if at any time entitled to have the action of the circuit judge reviewed, is at all times entitled to such relief, and by means of such writ as will preserve his facts and present his case to the revising court. If there is a revising jurisdiction in the case admitted, there must be a revisory jurisdiction in a case embracing the admitted one. How can the distinction, as admitted, exist consistently with the theory of the exclusiveness and finality of the decision of the circuit judge? If there be exceptions to the rule, on what do they rest? When and how do they begin, and when and how do they cease? If the jurisdiction of the special tribunal, as it is said to be, is conclusive in part it must be so in whole, if revisable in part it must be so in whole. By what rule is a jurisdiction over a single case made divisible, conclusive in part and appealable in part. Is there, in the

language of Judge McKinney, such a substantial departure from the proceeding prescribed by the statute as will render the proceedings void.

If we observe the injunctions of the statute the affirmative of the proposition is unquestionably true. The statute commands, "the requisition to give additional bonds shall in all cases be in writing, and signed by the officer making it; shall state the day and place, when and where the officer cited shall appear and give such bond, and copy thereof shall be served on such officer before the day specified therein." Such officer shall give the additional bonds within *ten days* after the day specified in such requisition, and failing so to do he vacates his office, and the officer making the requisition shall at once certify the fact to the appointing power, by whom the vacancy shall be filled."

The *first day of July* is the day and the *only* day specified in the requisition, and by the statute, as we have seen, Knight was entitled to ten days after the first, or until the 11th of July, to comply by giving additional bonds, if the court should determine he must give them. The statute giving the time is not merely directory, but is peremptory and positive, and leaves no room for any other construction than that indicated by its plain language. If, however, we could entertain a doubt upon the face of the requisition, the judge who wrote and signed it, and whose duty it was to do so, and construed it, has relieved us of all trouble. In his opinion in the case he says, "A requisition, signed by myself as judge of the circuit

court of this district, was made on said Knight to give additional bonds in the same penalty and conditions as the first official bonds, and naming the *first of the present month* (July) and the circuit court room as the day and place when and where said Knight should appear and give such bonds."

Instead of conforming to said statute and his requisition, Judge Reid decided the matter finally on the 5th of July instead of the 11th, and refused to take any further action in the matter, although, before the expiration of the ten days, Knight had offered bonds estimated by Judge Reid to be worth at least $250,000, an excess of $11,000 over the amount demanded by him, which was $242,000. The provision for time is an essential one in the statute, and it is only upon its observance the circuit judge is authorized to exercise the jurisdiction given by it. Its character demands for it a strict construction. So that whether the act to be done be either judicial or ministerial, if it do not pursue the statute conferring the jurisdiction it is void, and more especially so in cases of special and novel tribunals.

That the action of the circuit judge under the statute is judicial, it seems to me cannot admit of a doubt. The first thing he is called on to do when a case is presented is to construe the statute and determine his duties under it. This being so, and it being the rule that no appeal lies from his construction, we may have as many different constructions as there are circuit judges in the State, resulting in endless confusion, mischief, and inconvenience. We may

test the theory of the finality of the decision by this case. Suppose the circuit judge had concurred in the view of the attorneys of Knight that the act under which the motion was made was unconstitutional and void, would such holding have been conclusive, though the bonds may have been worthless? If so, the public would be without relief. Is it to result that the constitutionality of a law is to depend upon the diverse opinions of the several circuit judges in the State, and be imperative because held void in some circuits, and operative because held to be constitutional in others, and partially operative and partially not in others because so held by circuit judges? Or, being intended as the law of the land, must the authoritative construction come from the Supreme Court of the State? Again, if the circuit judge should hold bonds insufficient in substance, form and solvency, to be sufficient, there is no relief. His rulings are binding upon all courts upon the idea of finality. If it be answered that a court of chancery might relieve, the reply is, the action of the circuit judge constitutes a plea to the jurisdiction. If, however, this be waived, the action of the chancellor upon both law and facts is revisable in this court; or if a court of chancery is resorted to in the first instance, its jurisdiction is defeated by the law creating the special tribunal.

If the Legislature intended to make a ministerial agent merely, why select a circuit judge, who may have a dozen or more counties in his circuit? Is it to be infered that whenever a case arises under the statute he must, regardless of his term times elsewhere,

go to the county in which the trustee is to be required to give new bonds, or is he at liberty to wait till the time for holding his court in that county comes round? If the former, then one of the other eleven counties entitled to his presence may suffer because its business is permitted to remain untried upon its dockets. If the latter, then the argument of mischief and inconvenience from delay is suggested. The officer who is operating upon insufficient and insolvent bonds may hasten the collection of public revenue, pocket it and abscond. Instead of encountering such risks, if it be a mere ministerial agent who is wanted, why not select the sheriff of the county, the judge or chairman of the county court, or some other official of the county who is presumed to be better acquainted with the financial condition of the people of his county than a circuit judge living out of it can be? Or if these will not answer, why not provide by law for the election or appointment of such agent instead of distracting the duties and labors of a circuit judge?

Recurring to the statutes upon the subject, and construing them together, it seems to me there can be but little doubt of the judicial character of the duty imposed. In the first place, we see it is made the duty of the clerks of the county court to produce to the judge of the circuit court, for his examination, at the first circuit court in his county on the second day of the term after the first Monday in April in each year, the bonds, etc., for examination. That this must be done in term time is expressed by the statute. Then we have the provision for insufficiency be-

cause of the insolvency, death or removal of securities. Then the provision in case of good reason to fear the public interest may suffer for want of new and additional security, and then the provision for action upon the certificate of the grand jury, or a majority of them. In this connection it is to be remembered that grand juries are never in session except in term time; that at the time of the passage of the act circuit courts had to organize grand juries, and to give them these acts, or so much of them as pertained to their duties, in charge. Until a late period no other courts had grand juries—there are but few exceptions now. Even since the passage of the law, and after the organization of the criminal court for Davidson county (and perhaps even now it is so), it was the duty of the circuit court to organize and charge the grand jury, and receive their returns, etc.

I know of no authority, and none has been furnished, authorizing a grand jury to certify, as was done in this case, to a judge of a criminal court touching a matter over which he has no jurisdiction. In all the cases provided for, inquiry must be made by the circuit judge. If by statute the judge can only act in term time and while sitting as a circuit court, it follows as of course on an extention of the duty in the same matter, and over the same parties, and for the same ends and purposes, and without an express change of the time and manner of performing the enlarged duty, that such duty must be performed in the same way as is the duty first embraced, but subsequently enlarged, and so requiring would imply on the part

of the Legislature a purpose to keep records of the proceedings. When any of the matters embraced in the statute are brought to the attention of the court, the officer whose bonds are impugned must be summoned, this is nothing more nor less than an action against him to try the sufficiency and solvency of his bonds, by virtue of which he holds his office, and is entitled to its emoluments. A case between him and the State and county exists to all intents and purposes, and both parties have the right to be heard upon all questions arising in the matter, and to confine and be confined to legal testimony, and to demand and have from the court proper and lawful rulings upon the same, as in other cases involving rights and property. These rules have not been observed. Illegal testimony was admitted and competent testimony was rejected. "The law of the land" has not been administered. It is nowhere provided in the law that the circuit judge shall have exclusive and final jurisdiction of the case. There is nothing in the statutes beyond a conference of original jurisdiction. The Constitution does not confer such power upon the Legislature. The giving of such power must be alone by judicial construction, wholly unauthorized, as I think, by sec. 1 of article 6 of the Constitution of the State providing for a judiciary.

If special tribunals of conclusive jurisdiction may be created, the law creating them must be strictly construed, and nothing left to intendment. Such laws are inovations of a well recognized, acknowledged, and cherished principle of our institutions, that a party

aggrieved because he has not had the judgment of the law pronounced upon the facts of his case, has the right to have such grievance redressed by the court of last resort in the State—a rule intended to prevent the evils that might come of the ignorance, willfulness or partizan conduct of courts composed of one man with conclusive power. It suppresses the temptation of bribery and the danger of corruption. There is no principle nor the slightest element of one in our system of government that authorizes or countenances the lodgment of arbitrary power in the breast of one man, no matter what his official relation to society may be. The entire genius and spirit of the government oppose it, and are at war with it. There is nothing to authorize the conclusion that the tenure of office or property is or can be dependent upon the will of one man, or a single official. Were it otherwise the ruin of the State might result from that state of high political excitement common to us. The combinations in the organization of the government make it conservative and preserve it. They are checks upon fraud and securities against fraudulent conspiracies between the individdal in office and outside influences.

FREEMAN, J., delivered the following dissenting opinion:

This is a proceeding had before the Hon. Frank T. Reid, Judge of the Circuit Court of Davidson county, in which the office of trustee, held by Knight, is declared vacant because of assumed failure of Knight to

give sufficient bonds as required by law, on the requisition of said Judge or court.

The following sections of the Code are necessary to be cited for properly understanding this case.

By section 725 of the Code: "The clerk of the County Court shall produce to the Judge of the Circuit Court for his examination, at the first Circuit Court in his county, *on the second* day of the term, after the first Monday in April in each year, the bonds of all county officers taken in such year by the County Court."

Section 726 is: If upon said examination said bonds shall, in the opinion of the Judge, have been taken according to law, he shall write upon them "examined and approved," and sign his name thereto. But if any such bonds shall not have been taken agreeably to law, the clerk of said Circuit Court shall issue subpœna instanter for such officer to appear before said Judge immediately, to enter into bond, with surety, according to law.

Section 727, provides for declaring the office vacant, if the person so notified fails or refuses to give the bonds, as required.

By section 777, and succeeding sections of the Code, it is provided, first, that it is the duty of the Governor to require new or additional bonds from the Comptroller, Treasurer and Secretary of State, when, in his opinion, the interest of the State demands it.

By section 778, and sub-sections, "All other public officers who are compelled to give official bonds, may

be required by the court or officer whose duty it is to take or approve such bonds, to give additional security, or new bonds, in the following cases:

1. When the security of the original bond has become insufficient, by the subsequent insolvency, death, or removal of the sureties thereto, or any of them.

2. Where there is good reason to fear the public interest may suffer for want of such new and additional security.

3. When the Grand Jury of the county, or a majority thereof, certify the insufficiency of the original bond.

The requisition to give the additional bonds is to be signed by the officer making it, and state the day and place when and where the officer cited shall appear and give such bond, and a copy is to be served on the officer before the day specified therein.

By section 780, such officer is to give the additional bond within ten days after the day specified in such requisition, and failing to do so, vacates his office, and the officer making the requisition shall at once certify the fact to the appointing power, by whom the vacancy shall be filled.

By section 5079, and sub-sections, it is made the duty of the Grand Jury to inquire into various matters of county administration, among others, into the condition of the county treasury, and the bonds of county officers with regard to their correctness and sufficiency, and into the misconduct in office of county officers.

The facts in this case are briefly as follows: The

motion was made on the 18th of June, 1879, in the Circuit Court, to vacate the office of Knight, based on the statement of a report of the Grand Jury made to Judge Quarles of the Criminal Court, of the irregularity and insufficiency of his bonds as county trustee. Subpœna was issued for Knight to appear on the next day.

The Judge being sick, did no come into court until the 20th, when Knight appeared, and, after some contest, an order was made and entered on the minutes of the court, that "from an inspection of the four bonds given by him," and the report of the Grand Jury, said bonds were irregular and had not been taken according to law, and that the amount of bonds was not sufficient it was therefore ordered that Knight be granted till the first of July to give new bonds, (the amount of each bond being fixed), and if he fail to do so, his office to be declared vacant. On the 28th of June, Knight appeared by counsel, and took a bill of exceptions, excepting in general terms to the reading of the report of the Grand Jury, and then moved the court to justify existing bonds, which was refused.

On the 1st of July he presented new bonds, with the affidavits of parties to the same, before the court, specifying the amount and value of the property assumed to be owned by the bondsmen, so as to show they were probably good for the amount, on their own estimate of the value of their property. The Judge seems to have taken these bonds under advisement. And while so advising, took the affidavits of various real estate agents, as to their estimate of the value of said

property, and on this basis, reached the conclusion that the bondsmen lacked upwards of $37,000 of being worth as much as the sum required—and on the 5th of July he delivered an opinion, announcing this conclusion, with his reasons for it, and entered a final order vacating the office.

After this, perhaps on the 7th of July, an offer was made to increase the amount of the bonds, but this was refused, and a bill of exceptions (or which is claimed to be one), signed by the Judge—an appeal having been refused—and the case is now before us on writ of error and supersedeas, granted by one of the Judges of this court.

Two leading questions are presented on this statement.

First: Whether this proceeding is judicial in its character, and as such subject to review by this court by appeal or writ of error as a substitute for an appeal, or whether the action of the Circuit Judge is merely a matter of administration, in the nature of a special tribunal, assigned to the duty of accepting or rejecting these bonds, whose action is final, and from which no appeal lies, and as we understand it, no remedy whatever existent, by which the propriety of this action can be effectually tested.

This question is one of no little difficulty. The statutes conferring the authority have said nothing to enlighten us on this question. We are, therefore, compelled to arrive at our conclusion from the nature of the duties imposed, the tribunal to which it is assigned, and the general analogies of law, as found in our local jurisprudence.

On the part of those who maintain that this is not a judicial proceeding and no appeal lies, the argument from inconvenience and detriment to the public service, under a contrary practice, is pressed with much force, and made controlling in reaching the conclusion arrived at in support of the negative.

It is assumed the duties of the Circuit Judge, in a case like this, are the same in kind as that performed by the County Court, or a County Judge when one exists, in taking the bonds originally, and that in case the County Court or County Judge should refuse to accept bonds tendered by an officer for any cause, no appeal would lie, and probably no remedy exists whatever—at any rate, the remedy is not definitely pointed out. This is based on the confession that would or might grow out of a contest over such a question—the officer not being inducted into office until bond given, and the injury to the public service by having no officer to perform the functions of the office. While this is felt to be of great weight, and as applied to the question of induction into office originally, might or might not be controlling, the question is, is there not a difference between the case of an applicant to be inducted into office, and the one of an officer already in office, who is to be turned out of office by the proceeding? It might very plausibly be maintained, that in the first case, the tribunal appointed to take the bonds, being the county officials familiar with the citizens of the county, would be the fittest tribunals possible to determine on the solvency of the parties to such bonds, and that this question could

well be left to them, as it must be reposed somewhere. But the argument would entirely fail in almost every case in our State, where the Circuit Judges preside over from four to even as high as nine counties, and even in the two or three cases where he presides over but one county or part of a county, the nature of his office and duties renders it next to impossible he shall have any such peculiar knowledge.

But I think the distinction in the two cases is very well marked by this fact. In the one case, the County Court as the representative body, having control of the police and administration of the county, may and does properly decide on the solvency of the parties to all official bonds. In the case before us, an officer is in the possession and enjoyment of his office; it is a well-settled property right, one having emoluments of value, and having honors that in a republican government are sometimes deemed of equal or greater value. Is it the same thing precisely to be ousted from the enjoyment of these upon the arbitrary decree of a Circuit Judge, based on a mere inspection of his bonds, or his adjudication, not judicially made even, that the bonds tendered by him are insufficient? It seems to me there is enough of difference in the two cases, in connection with the difference in the tribunals, on which to base a distinction in favor of the right of revision in the latter case, even though denied in the first.

But let us turn for a moment to the other side of this question, and see if there are not arguments to be drawn from the same source of equal, if not

greater weight in favor of the idea, that this is a judicial proceeding, and as such to be conducted on legal investigation, and an improper or erroneous judgment subject to be corrected and revised, as in other cases.

First. I think there is no more of inconvenience or danger to the public interest in suspending the judgment of the Judge removing from office, than there would be in the common case of a contested election.

In the case of *Blackburn* v. *Vick*, 2 Heis., 381, this court held, that notwithstanding there was no statute providing either the mode or tribunal in which a revenue collector's election should be contested, that nevertheless, such a contest could be made before the County Court, and that from this decision an appeal lay to the Circuit Court, and then to this court. This conclusion was based on the fact that the county court was to induct the party *elected* into office and take his bonds, etc., and then on the further ground, that the right to be elected to the office involved the right "to assert, prove and maintain the right to the office." The court say: "If, however, another party may take the office, regardless of the question of who is elected, then unless his right can be contested and tried before the tribunals of the country, there is no remedy. He has a right, but no remedy for its infringement."

I think this reasoning sound, and its application to this case forcible. The party is in office—has a right to it by law—has been by the County Court regularly inducted into office, giving the bonds required

by that court. A grand jury, on an *ex parte* investigation, reports that these bonds are insufficient. If the theory maintained be true, then this or any other county officer may be turned out of office on this report, although his bonds tendered in response to this report may be perfectly solvent, all that the law requires in order to its enjoyment. I confess, that while conceding the force of the argument of *inconvenienti*, in this case, I have a more determined and inveterate objection to the exercise of irresponsible power, than I can ever find to the production of mere inconvenience in public administration. These inconveniencies in the warmth of argument will generally be more or less exaggerated, but in practice will be found to be much modified, and far less than an acute mind can show them to be, when pushing the results of a principle to its utmost limits, besides they can be readily remedied by legislative action

But the evils of irresponsible power by which a man's property, whether in an office or any other species of property, are so real and so far reaching, have so many consequences that cannot be foreseen, are so abhorrent to the genius of our government, and subversive of the enjoyment of rights by the citizen, that there can be but little exaggeration in this direction. Its exercise is everywhere felt to be the essence of tyranny, and not to be permitted in a free government. The axioms of liberty embodied in our Constitution, taken from *Magna Charter*, but express the universal sentiment of all free persons on this subject: "No man shall be taken or imprisoned, or

disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." I need not say that the law of the land does not mean either an arbitrary enactment of the Legislature, or an arbitrary judgment, without an investigation, or a right to be heard. This is all axiomatic in our jurisprudence.

The proceeding by which a man is deprived of a right of property, must be by due process of law, a trial, investigation and determination, after a hearing, in which the facts are presented—and this is a judicial proceeding, whatever its form may be or however informal.

In the case cited from 2 Heis., there was no provision of the statute for contesting the election of the particular officer then before the court. Yet we held that in such a case it was the duty of the court which was to induct into office, to try such contest and to prescribe the form of an issue that should be made up, so as to present the question to be decided, and if not made up in the County Court in the first instance, it was the duty of the Circuit Court, on appeal, to have such issues made, hear the evidence, and decide the question. In this we followed the case of *Boring* v. *Griffith*, 1 Heis., 456,—opinion by my Brother McFarland. In that case it was further held, that when the contest had been commenced, the right should be tried and contest determined, even after the one claimant had been inducted into office. This necessarily involves the result that such officer might

be turned out of office—but both cases hold it is a judicial proceeding, subject to appeal and revision. This is beyond dispute. Now if these cases be not overruled, then I cannot see how they can be distinguished in principle from the present case. The only element of difference is in favor of the right in this case, there being no question as to the party having been elected, and regularly inducted into office.

The one is a contest to assert a right to an office by election alone—the other is the assertion of the right, after induction into office. In the one case there is a claim that another is entitled to the office, and so there is an element of doubt as to the right of the contestant and the other claimant, as the case may be decided in favor of either the one or the other. In this there is no such element of doubt, no right of any one being possibly interfered with—only the defendant arbitrarily deprived of his office, with no remedy for the wrong.

It does seem to me, that if a party merely claiming the right to be inducted into office, is entitled to a trial and be heard before the courts of the country, before that right shall be determined against him, that much more shall he who already has the office, be entitled to the same measure of right before he can be deprived of his acknowledged and valuable property—certainly it devolves on those asserting the contrary, to distinguish between the two cases, or show at least a plain requirement of the Legislature in favor of the contrary view in a case like the present. To rely upon inference, and that, to say the least of it,

not very fairly drawn, as I think, cannot in my opinion be justifiable.

In addition, I may say, the action of the County Court as to induction into office, including of necessity the taking of the bond, was held in the above cases judicial action, and so the argument is, in some degree at least, real, that the County Court acts in the first place arbitrarily in the matter of induction into office, and on this assumption much of the argument of the majority opinion stands for its support.

Again, by the Constitution, bill of rights, sec. 17, "All courts shall be open, and every man for an injury done to him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial or delay."

In view of these fundamental provisions, I feel bound to hold (unless the contrary is expressly declared), that all proceedings by which a party is to be deprived of his right are judicial, and therefore not arbitrary; and if judicial, then subject to revision and correction in the common course and ordinary mode in which such action is regulated or revised by this court.

It is a question in fact, where no rule is positively prescribed, as to whether we shall favor arbitrary or judicial action in a case involving a valuable right. On such a question, I cannot hesitate to decide in favor of judicial, rather than the rule of arbitrary will. This, I think, presents sharply the real issue. There is no mandate of the Legislature forbidding the infer-

ence that the action of the Circuit Judge is judicial in its character. All is to be inferred—all the weight of traditions of our jurisprudence, as well as requirements of our Constitution, are in favor of the construction that makes it judicial, and all these are against the opposite view.

Let us for a moment look at the nature of the duty to be performed, and the tribunal performing it. It is, that he shall be required to give new and sufficient bonds, where they are insufficient. The sufficiency of a bond to secure the revenue collected by such an officer, is a question of fact to be ascertained as other facts are ascertained, by testimony or other evidence appropriate to elicit the truth in the case. The investigation in this case involves in it no element different in essential features from any other investigation of the solvency of parties in our courts—such, for instance, as to whether a voluntary conveyance shall be held good by reason of the maker having retained sufficient property to meet his liabilities. If this be so, there is the nature of the thing to be done in favor of the view that what is to be done is a judicial act.

Assuming that it is a proper holding for the sake of the argument, that the Circuit Judge is the officer to act on the report of a grand jury, then the fact that the action is to be taken by a Judge, carries with it a strong inference, that his action is to be judicial action. This is controlling to my mind, unless the nature of the act to be performed repels this idea. We have seen it does not. This ought then to be

met by a mandate of the Legislature showing a contrary purpose. This is not to be found—and neither existing, I can see no escape on these grounds from the conclusion that the act is judicial.

But when we look at the *requirements* of the Code, this view is still stronger, as I think. Taking all the sections together, they may be summarized in about this: That where the bonds are not taken according to law, that is in the prescribed form or amounts, the party shall be summoned before the Judge immediately to give such bonds, and on *failure* to give them, the office is to be declared vacant. But suppose he does in fact tender them, does it not follow it is not vacant, and cannot be so declared? But if the action of the Judge is not judicial, and no appeal, then we are left to his unchecked will. But to proceed, on the report of the grand jury of the county or a majority of them, that the bonds are insufficient, then the party is to be cited to appear and *give* such bond as is sufficient. He shall give the bond within ten days after the day specified in the requisition, and failing, the office is to be declared vacant. His right is clear to remain in the office, if he gives the bond required by law. This fact, then, must be adjudged by the tribunal which is to take it. That tribunal being a judicial officer, on what principle we are to assume he is to act unjudicially (so to speak), when it is not said so, I am at a loss to see.

The reports of grand juries in every case, except three or four in our State where we have special

criminal courts, will be made directly (if this court has jurisdiction), to the Circuit Court during its session. It seems to me eminently proper, that whatever tribunal shall perform this duty, there should be a record made of so important a matter as the removal of an officer from his office. If the conrt acts judicially, this will always be done on the minutes of the court. If not, then no such record will exist, and a simple statement sent to the appointing power, will be all that shall evidence the vacation of the office by the officer chosen by the people, and the only warrant for filling the vacancy thus created. I confess this does not accord with a well-administered system of government in any view.

But another view presses itself upon us. Our officers of this character are filled by election of the voters of the county. This gives the right, under our Constitution and laws. The view which I am combating involves the proposition, and that to the fullest extent, that this election, and this right resulting from it, even after induction into office, may be all nullified and rendered of no effect, by the will of one man, and it may be, and in most cases will be, by a citizen of another county. The case need but be, of a report of a grand jury or seven of that body, of the insufficiency of the bond of an officer. He is required to give a sufficient one. He tenders one amply good, as the law requires, but the Judge says, I refuse to accept the bond tendered, and he goes out of office. No reason need be assigned, no record is to be kept. The only writing is the notification to

the appointing power. Is there no remedy for this, no check on such action? On the theory maintained, I see none.

If you say a *mandamus* would lie to compel a Judge to do his duty, as a ministerial officer, then does not the same inconvenience occur, as in the case under the view I have contended for, or may not the confession be worse? For if the right to a *mandamus* is conceded, then it may be successful, and then you have the question as to who was entitled to the office and its perquisites during the time of the contest, to settle, whether an appointee, as on a vacancy that did not in fact exist, or the officer having the right. Whether the office could be held vacant and filled during the pendency of the proceeding to compel the acceptance of the bonds, I need not determine. Be that as it may, there is difficulty enough in the case.

This being so, I think the argument from inconvenience is sufficiently met, and certainly the only fair construction is, that there is no remedy, or none that is effective, which is the same thing. And that brings us to the simple question, whether the Legislature has the power to authorize a party to be deprived of his office arbitrarily, at the will of any man or tribunal, with no remedy in case his right is infringed. To this I but answer in the language of the bill of rights already quoted: "No man shall be disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

If an emergency or public exigency can create an exception in the case of the right to an office, it may equally do so in the case of imprisonment, of disseizin of his freehold, or exile, or even his life. I see no place where the line can be drawn which shall say, so far you may go, and no further, and therefore I shrink from the first step, as I would from all that might follow.

I see no great practical inconvenience to follow from this view. The bonds taken by the County Court or Judge, will in most cases be good, or approximately so. In most cases the officer, when required, will tender good ones, and the Judge accept them. The county will have the original security of the first bonds for their protection, and the new bonds tendered, if accepted at last at the end of the contest, to cover all liabilities, and this will be ample. When a contest is pending, the officer will be likely to be careful in the performance of official duties, besides be watched by interested sureties. So that all the probabilities are in favor of a faithful performance of duties during the period. Besides, there is the supervision of a grand jury every four months, together with the general supervisory power of the County Court or County Judge. The influences and checks may better be trusted to, I think, than to permit any man arbitrarily to exercise the function of depriving an officer of his right to his office, its honors and emoluments. The public interest, I think, cannot seriously suffer during the trial of the question of the sufficiency of his bonds. Constitutional liberty must

always receive a shock, when arbitrary power is exercised to the injury of the right of the citizen. I do not feel at liberty to measure the extent to which this may reach. It is sufficient to know it is the exercise of arbitrary power, to say, it might not, it cannot be, under our Constitution of government. Conceding, but not admitting, for the sake of argument, that the fair construction of the provision of the Code is, that the Legislature intended to give the Circuit Judge, individually, but not as a Judge, nor judicially, the power to decide upon the right of an officer to continue in his office, and to deprive him of that right, and that this decision should be made practically at his will, and be final, not subject to appeal or revision, I do not think the case is helped in the least. The Legislature can no more deprive a man of his rights by authorizing another man to deprive him of them, than it can do so by a direct enactment to that effect. What it cannot do arbitrarily, it cannot authorize to be done in the same way. This certainly does not need authority to sustain it.

If admitted, then the fact that Frank T. Reid, as a special tribunal, not bound by the forms of law, nor acting as a judicial tribunal, has said that the trustee of Davidson county shall be deprived of his office, can have no more force, than if the Legislature had said it, and that would have none whatever. In short, I deny the power of the Legislature to confer the power on any man, or body of men, to deprive a citizen of any property or right whatever. This can only be done by authorized judicial tribunals, acting

through the established forms of law, after due investigation according to such forms, in other words, by the law of the land, or the judgment of his peers. It certainly never can be maintained, that while a man cannot be deprived of the right to a horse or cow by the arbitrary enactment of a Legislature, either directly or indirectly by authorizing another to declare it forfeited, yet that an office to which he has been legally elected, and which he then holds, shall be taken from him arbitrarily without remedy, that may yield an income of five thousand dollars, enough to purchase fifty horses or cows or more. Yet this is the result of the theory of the majority opinion, as I understand it. All this too is sustained, not by the express language of the Legislature, but from the influence solely of the argument *ab inconvenienti*, and danger of public inconvenience. Conceding the just weight due the argument from this source, it can never rightly be as the dust in the balance, as compared with the evils incident to the exercise of arbitrary power, to deprive a citizen of a valuable right.

The truth is, that supposed demand of sudden exigencies can never be made a sound basis for general rules of law or right. Decisions made to meet such cases will always be found incongruous, and impossible to be fitted into our general system, the leading idea of which is, that all rights are to be determined by the regularly established exponents of the law of the land, acting under the responsibilities of judicial position, with its wholesome legal and traditional restraints and limitations. After careful thought, however, I

conclude the Circuit Judge has no jurisdiction, either as a court or as a special tribunal, over the question of the bonds of the county officers, except in the case specified in section 725, where the clerk of the County Court produces the bonds of all county officers, at the first Circuit Court in his county, on the second day of the term, after the first Monday in April in each year. In this case I think the court acts judicially. He is to act at the first Circuit Court and on the 2d day of the term, thus implying it is a part of the business of the court during that term, and he is to decide on the validity, as a matter of law, of the bonds. This is a legal question, placed under the jurisdiction of the Circuit Court, of which it takes cognizance at the specified term every year.

But let us turn to the provisions of section 778 and sub-sections, that all public officers who are compelled to give official bonds, may be required by the court, or officer whose duty it is to "take or approve such bonds, to give additional surety or new bonds in the following cases:

1. Where the security in the original bond has become insufficient, by the subsequent insolvency, death or removal of the sureties thereto, or any of them.

Now it is clear that this case is not referred to the Circuit Court or Circuit Judge, for he as such cannot be made cognizant of the facts, living, as he does in most cases, out of the county, (he can but reside in one), he has not the means of knowledge of the facts specified on which the new bonds are to be taken, and no mode of bringing the facts to his at-

tention is provided. The duty is an appropriate one to the chairman of the County Court, or that court, or the County Judge, where there is one, and we take it that this would be conceded, that in the case under this sub-scction, the court or officer approving or taking the bonds in the first instance, is the one to require the new bonds.

The second sub-section is, where there is good reason to believe the public interest may suffer for want of such new and additional bond. Certainly it would not be claimed that so general a duty as looking after the public interest of a county, and of each county in his circuit, in reference to official bonds, was intended to be imposed on a Circuit Judge, and that to the exclusion of the County Court or chairman, the body having general supervision of county administration. The fact that some of these Judges have as many as nine counties in their circuits, and all as many as four, except three or four, would preclude this conclusion. The fact, too, that this is a matter of county administration, which belongs under our system peculiarly to the County Court or County Judge, would render this absolutely certain, unless the Legislature had, in terms unmistakable, so expressed its will. This has not been done.

Then follows the third sub-section—when the grand jury of the county, or a majority of them, certify the insufficiency of the original bond.

To sustain the jurisdiction of the Circuit Court, it must be shown, that in this last case the duty of taking the new bond is to be performed by a differ-

ent official or tribunal, from the one to which the cases in the first and second sub-sections are referred. But the section 778 expressly fixes the duty in each case on the same court or officer, that is, "*the court* or officer, whose duty it is to take or approve such bonds;" that is, as I construe it, in the first instance, as the regularly established official or officers, whose ordinary duty by law is to take these bonds. It would but be natural, that the same tribunal that took or approved originally, should be charged with the duty of seeing that the bonds taken should continue equal to the end for which they were designed, and this whether the knowledge of the need of new bonds should come to the officials charged with the duty, from observation, or by the report of the grand inquest of the county. The language of the sections defining the duties of the Circuit Judge, section 725, and that of 778 and 779, tends to aid this view. In the first case, it is that the clerk shall present the bonds to the "Judge of the Circuit Court"—the "Judge shall examine," and the officer is to be summoned to appear before "said Judge." In this case, however, 779, the requisition to give the additional bonds shall in all cases be signed by the officer making it—not the Judge. The *officer* making the requisition shall certify to the appointing power, etc. If the same officer was intended, to-wit, the Circuit Judge, it is strange that in the one case it is so said, and in the other left under the indefinite designation, officer. This, however, may well apply to the Chairman of the County Court or a County Judge

But section 426*a* of the Code, (act of 1868–9, ch. 41), it seems to me, makes this view still stronger as to the county trustee. It provides: "It shall be the duty of the County Courts, or board of commissioners in this State, to examine into the solvency of the county trustee's bonds, and if found to be insufficient, as provided by law, it shall be the duty of the court to notify him of the fact, and require him to give new additional security in such sums as may be fixed upon by the court, sufficient in their judgment to cover the revenue of the county, and if the bond or security be not given on or before the ensuing term of the court, then it shall be the duty of said court to declare the office vacant, and to elect or appoint his successor, who shall be required to give bond," etc.

This section, fairly construed, would seem to impose the duty of examination into the sufficiency of this bond on the County Court, and manifest the legislative intent to be, that this body was the body charged with the supervision of this branch of county administration. The County Judge or chairman of the County Court, by section 421, is made the accounting officer, and general agent of the county. As such general agent, the County Judge and chairman is the officer to whom the report of the grand jury should be made, and who is to make the requisition to give the additional bonds in the first two cases provided for in the sub-sections; and if so, it seems to me, it fellows inevitably that the same duty is to be performed by the same officer in the latter case. Certainly no reason is found for the duty being imposed

on the Circuit Judge, and all the analogies of our system of administration require it to be performed by the County Judge or chairman, as the general agent of the county. Why take it from the general agent of the county, and give it to an irresponsible individual, who is Circuit Judge—not to that court?

This act of 1868, requires the performance of the precise duty that has been performed here, to be performed by the County Court. Why may this court not as well look after and examine into the solvency of the bonds of the trustee, on the report of the grand jury, as the Circuit Judge? We see no reason against this practice. This statute has but to be held to modify the former statute, as to the time to be given, and give the jurisdiction directly to the County Court in the case of county trustee, and you have the whole system of county administration in harmony, and confided where it ought to be, to responsible representatives of the county, familiar with the question on which it is to act.

For these and other reasons, I am for reversing the action of the Circuit Judge in this case.

J. J. STEPHENSON *et als. v.* L. OATMAN *et als.*

AWARD. *Arbitrators. Relationship to parties interested. Case:* O. executed a mortgage upon a house and lot to F. to secure him as his surety. Afterward the railroad run through said lot, and the question of damages was submitted by O. and the R.R. Co. to arbitrators, who awarded damages. The arbitrators were related to F., which fact was known to the R.R. Co., but they had no *actual* knowledge of the mortgage on the lot to F. Upon a bill filed by F. seeking to appropriate the sum awarded as damages, and upon cross-bill by the R.R. Co. impeaching the validity of the award, held, that the award should be set aside. Arbitrators should be free from interest or relationship in all cases, unless such disqualifications are waived by the parties.

FROM MAURY.

Appeal from the Chancery Court at Columbia. W. S. FLEMING, Ch.

GEO. FRIERSON for complainants.

JAS. H. LEWIS for defendants.

DEADERICK, C. J., delivered the opinion of the court.

J. J. Stephenson and Robert W. Frierson, as executors of Thomas G. Frierson and James A. Fleming, file their bill in this case against L. Oatman and the Duck River Valley Narrow Gauge Railroad Company. They show that testator and complaint Fleming being liable as sureties for Oatman in 1866, took a mortgage from him of a house and lot in Columbia to secure them. That subsequently the said railroad company had built their road through said lot. Oatman

and the company agreed to submit the question of damages to the arbitrament and award of F. H. Watkins and H. L. Holman, empowering them to choose a third man if they could not agree. They not agreeing, chose Charles Clear as umpire, and the three united in making an award October 14, 1875, in favor of Oatman for $1,150.

Complainants, against whom judgment had been rendered on Oatman's debt, in March, 1877, filed their bill to subject the mortgaged premises to sale, and to have the $1,150 awarded Oatman for land taken and damages to the mortgaged premises applied to pay said judgment. Oatman does not contest their right to the relief sought, but the railroad company, in its answer, which was filed as a cross-bill, impeaches the validity of the award upon the grounds that at the time they agreed with Oatman to submit the question of damages to arbitration, he claimed to be the owner of the lot, while in fact he had previously conveyed the same to Frierson and Fleming; and secondly, that Watkins, one of the arbitrators, was brother-in-law of complainants, Fleming and Frierson, and step-father of complainant, Stephenson, and that the railroad company had no knowlege of the interest of complainants in the question submitted to the arbitration of their near kinsman. For these reasons, and because the damages are alleged to be excessive, the railroad company insists that the award should not be held as valid against them, but should be set aside.

It appears from the record that the agent of the railroad company who agreed to the submission to

Watkins as one of the arbitrators, knew of his relationship to the complainants at the time he entered into the agreement, but it does not appear that he had, at any time before the award was made, actual knowledge of the existence of the mortgage of the house and lot to Frierson and Fleming. Notice of this fact is denied, and want of such knowledge is proved by the agent authorized to act for the company. It is insisted that as the mortgage was registered it will be presumed that all persons had notice of it. However true this may be in a contest between adverse claimants of the mortgaged premises, we do not think it is of any consequence in ascertaining whether one of the parties to an arbitration had waived objection to one or more of the arbitrators on account of his relationship to the parties. In such case, if it was shown that a party had knowledge of the fact of relationship of a proposed arbiter to one of the parties and did not object, his waiver of such objection might well be presumed. Complainants knew that Watkins was nearly related to them, and that they were interested in the question submitted, but this latter material fact was unknown to the other party. Arbitrators are judges chosen by the parties to settle their controversies, and ought to be free from interest or relationship in all cases where they act, unless such disqualifications are known and waived by the parties. Frierson and Fleming were not, it is true, parties to the submission, but they were directly interested in it.

Another objection to the award is that while the railroad company are sought to be held to its per-

formance, they could not have obtained title to the land if complainants had ohjected, and for this reason of want of mutuality it is not binding. And for these reasons the chancellor's decree against the railroad company for the sum awarded by the arbitrators must be reversed. But inasmuch as the chancellor has jurisdiction to enforce the trust in favor of complainants, and as they are entitled to have the value of the land taken by said railroad company, and damages applied to their exoneration or indemnity as the sureties of said Oatman, the cause will be remanded for the purpose of having an account taken to ascertain the value of the land taken by said company, and damages to the residue, the counsel for said company withdrawing his plea of the statute of limitations, and expressing the readiness and willingness of said company to pay upon a fair estimate of their liability being made to complainants and defendant Oatman.

As to the decree of sale of the property sold, the same will be affirmed, and the chancellor will make such further decrees as may be necessary to settle the rights of the parties. The costs of this court will be paid out of the fund, and the costs below as the chancellor may adjudge.

E. Y. Pillow, Clerk, *v.* Jas. L. Gaines, Comptroller.

Statute Construed. *Warrants for State costs.* So much of the second section of the act of the Legislature of 1879, ch. 101, as directs the Comptroller to issue warrants to chairman of the county court for costs chargeable to the State, to be paid into the county treasury, is inoperative and void.

FROM DAVIDSON.

This was a petition for a mandamus by the Clerk of the Circuit Court of Maury county to compel the Comptroller to issue to him a warrant for his costs against the State, instead of issuing the same to the chairman of the county court. The mandamus was refused and the clerk appealed. Frank T. Reid, J.

John V. Wright and Henry Cooper for Pillow.

Attorney-General Lea for Comptroller.

Turney, J., delivered the opinion of the court.

On the 14th of March, 1879, the Legislature passed the following act:

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that section 5570 of the Code be and the same is hereby so amended as to read, A copy of the judgment and bill of costs certified by the clerk of the court and by the Attorney-General and Judge as provided in the preceding section shall be presented to the Comptroller, chairman of the county court or county judge, as the case may

be, by the clerk, or some other person authorized by him in writing, to so present the same.

"Sec. 2. Be it further enacted, that if upon examination by the Comptroller the costs mentioned in the first section of the act are chargeable upon the State, the Comptroller, when the same is audited, shall issue his warrant upon the treasury in favor of the judge or chairman of the county court for the amount thereof, and the judge or chairman of the county court shall pay the same over to the county trustee, who shall keep the same separate and apart from other funds in his hands; and the county judge or chairman, if upon examination they find said costs properly chargeable to the county, he shall issue his warrant on the county trustee for such amount as may be due each officer, witness, or other person whenever called on for the same.

"Sec. 3. Be it further enacted, that if the costs mentioned in the first section of the act are chargeable upon the county, the county judge or chairman, after the same is audited, shall file the same in his office, and issue his warrant on the county trustee for such amount as may be due each officer, witness, or other person whenever called on for the same."

The question presented arises upon the second section. Having given an exact and literal copy of the act, it is scarcely necessary to call attention to its clumsy phraseology. We think it clear that by the first clause of the second section it was the intention of the Legislature to confine the action of the Comptroller to such costs as were or are chargeable to the

State, and that when the same had been audited by him, and his warrant issued, then the matter as to such costs was finally ended, leaving open no further inspection or inquiry as to the correctness of their taxation against the State. That the second or concluding clause of the section prescribes the duty of the county judge or chairman as to the costs taxable or chargeable to the county, confining his jurisdiction and duty to such costs, the issuance of his warrant as to them being also final.

These purposes are clearly indicated, as we think, by the first section of the act requiring properly certified bills of costs to be presented to the financial agents of the State and county that the costs due from each may be respectively audited by the proper officers. There is no authority in the Comptroller to control or interfere with the finances of counties, nor in the chairman or county judge to do so with those of the State, nor do we find in this act any purpose on the part of the Legislature to confer such powers, were it admitted it could do so. As the first clause of the second section directs the costs chargeable to the State to be paid into the county treasury, and makes no provision for its payment out, but on the contrary directs the trustee to keep it separate and apart from other funds in his hands, we are of opinion the Legislature transcended its authority in appropriating to no purpose the private property of the individuals entitled to such costs, and that such part of said section is inoperative and void.

We see no objection to the remainder of the act,

which is very similar in its provisions to sec. 521 *et seq.* of the Code, construed by this court in *Head* v. *Berry*, 1 Lea, 753.

The judgment of the circuit court is reversed, and judgment will be entered by this court.

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J. B. JOHNSON *v.* THE STATE.

CRIMNAL LAW. *Tippling. Incorporated institutions of learning. Repeal of the charter of a town. Effect on license granted.* The charter of the town of Hartsville was repealed. There was in the town an incorporated institution of learning. The defendant, a few days before the repeal, procured license to tipple for twelve months, and had his saloon in Hartsville. Upon the repeal of the charter he was indicted for tippling within four miles of an incorporated institution of learning, not within an incorporated town. Held, he was liable to conviction, notwithstanding his license had not expired. The grant of the privilege to tipple, which might be exercised within an incorporated town, irrespective of its proximity to incorporated institutions of learning, does not include the right to do so upon the repeal of the charter of the town, nor preclude the Legislature from repealing the charter of the town, or change the results of such repeal.

FROM TROUSDALE.

Appeal in error from the Circuit Court of Trousdale county. W. N. MCCONNELL, J.

J. J. TURNER for Johnson.

ATTORNEY-GENERAL LEA for the State.

FREEMAN, J., delivered the opinion of the court.

The defendant was presented by the grand jury of Trousdale county for unlawfully selling and tippling intoxicating liquors on the first of May, 1879, within four miles of an incorporated institution of learning in the town of Hartsville, in said county, the said selling not being within an incorporated town. He was found guilty under the instructions given to the jury by the court, and has appealed in error to this court for a reversal of the judgment.

The statute under which the party was convicted is highly penal in its provisions, the jury fixing the defendant's fine at one hundred dollars, and imprisonment in the county jail for one month. The case, as presented in the agreed facts, is as follows:

The defendant had been in this business for a number of years in the town of Hartsville, obtaining license from the county court clerk, as required by law, taking his license uniformly for the term of three months. On the 11th day of March, 1879, the firm of which defendant is a member took out a license for twelve months, which was duly and legally issued to them upon payment of one hundred and fifty dollars, State and county tax for the privilege thus granted. It may be remarked here that the terms of the license granted are "to keep a tippling house at any one place in Trousdale county" for the period specified. Bond and security was also required by law in the sum of five hundred dollars, that the parties are

to keep an orderly house, and in all things conform to the requirements of the statute under which the license was granted, which is an act "to tax and regulate tippling and tippling houses, and to increase the revenue."

At the date of the issuance of the above license, the town of Hartsville was an incorporated town, and had been since 1858. The institution of learning situated in or near said town had been incorporated in 1856. The charter of the town of Hartsville was repealed March 28, 1879, and the inhabitants permitted, if they choose, to accept the benefits of the "taxing district" system inaugurated by the last Legislature, but the agreed case shows they have not done so.

By the act of Assembly of March 20, 1877, it was made a misdemeanor to sell or tipple spiritous liquors within four miles of an incorporated institution of learning in this State, under penalty of not less than one hundred nor more than two hundred and fifty dollars, and imprisonment not less one nor more than six months. But the second section of this act excepted from its application the sale of such liquors within the limits of any incorporated town, and also to sales made by persons having license to make the same at the passage of said act, during the time for which such license was granted. It has been urged that we should hold the exception in the above statute in favor of existing rights under licenses granted, and should protect the defendant in this case. But the language of the act is definite, that only such licenses as were owned by persons at the

date of that act, to-wit., March 19, 1879, are excepted. The case then is that there has been a sale of spirituous liquors within four miles of an incorporated institution of learning not within an incorporated town. Nothing more appearing the party is clearly guilty under the act of 1877, under which he was convicted. He defends, however, under the license issued and paid for March 11, 1879, authorizing him to tipple in consideration of one hundred and fifty dollars, State and county tax, paid to the State, under a law of the State authorizing such license. The terms of this license, as we have said, are that the party is authorized to "keep a tippling house at any one place in Trousdale county" for twelve months from the date of its issuance. It is claimed that this license gives immunity for twelve months to keep a tippling house in the town of Hartsville, it being the place of business of the parties at the time, and being lawful to do so at the time, because the town was then an incorporated town, and liquor might be sold within its limits, notwithstanding the proximity of an incorporated institution of learning; that the license is a contract to be allowed to sell for the twelve months, the obligation of which cannot be impaired, and that the repeal of the charter exposing the parties to the penalties was such an impairment, if they are now held subject to the penalties of the statute.

We do not deem it necessary to give a definite decision of the question whether such license is a contract protected by the immunities in favor of the right

thus secured under the Constitution of the United States and of our own State. The terms of the license and the grant of the privilege are expressed in very general terms, it is true, and if literally construed, might be held to include the right to sell anywhere within the limits of the county, subject to no restriction, control or regulation. But this would not be a fair construction of what was intended, even assuming it to be a contract in the fullest sense of the term. We take it that the fair meaning is that the party is to enjoy the exercise of the privilege granted, subject to such reasonable police regulations as may be deemed necessary for the protection of the community. That it shall be held and enjoyed in the same way as other rights secured by the Constitution and laws of our State. For instance, a man has the right to own a horse, it is his property, and he may use him, in a reasonable way, as he pleases, but not to the detriment of his neighbors' rights, nor the disturbance of the community, as by riding into a public assembly, or taking him into a church. He can ride his horse as rapidly as he chooses, as a general rule, but, as we have held, he cannot run him along a public road at the peril of doing an injury to other persons equally entitled to the use of the highway with himself. So under this license the party would tipple, but not on election days, nor within a mile of a religious meeting, and the like restrictions found in our statute book.

In view of the importance of the police powers to the well being of the State, it ought not to be held

that its reasonable exercise for the regulation of the enjoyment of even well defined rights, is in any way an infringement on the rights of any member of the community, except where the violation of that right is clear and unmistakable. In this view of the question we hold that while the party here may be conceded to have the privilege to tipple in the county of Trousdale for the period of twelve months, the regulation that he shall not do so within four miles of an incorporated institution of learning is but a reasonable regulation, and one to which his right may be well subjected without impairing in any fair legal sense the enjoyment of the privilege granted. In other words, that he takes the privilege, and may enjoy it, subject to the paramount right of the State to protect the community from evils incident to its exercise. He may well enjoy the privilege of tippling in the county of Trousdale, and at the same time the State may well provide for the protection of her youth from the baneful influences of his traffic while engaged in the acquisition of an education, in many cases away from home and the watchful oversight of parents and guardians. This does not abrogate his license, but leaves it in full force—only regulates its exercise for the general good. It could not be maintained in any aspect of the question that the grant of the privilege to tipple, which might at the time be exercised within incorporated towns, irrespective of their proximity to institutions of learning, necessarily included the right to do so should the town cease to be incorporated, nor could it be held that the Legislature was precluded

from repealing the charter of incorporation of any town, or if it did do so that all the results of such a repeal should not follow in order to the protection of parties in the exercise of the right to tipple under a license. The right granted may be exercised with ample freedom in this case in the county of Trousdale without the violation of any law by simply engaging in the business within an incorporated town, or farther than four miles from an incorporated institution of learning. For these reasons we hold the view of his Honor, the circuit judge, correct, and that the conviction of the party was properly had, independent of the question whether his licensed privilege be a contract or not.

On that question we find the decision of our courts conflicting, and not very satisfactory, to say the least of them. In New York and Massachusetts it has been held that a license granted has not the elements of a contract and protected as such, while in New Hampshire, Alabama and New Jersey the contrary has been held. *Metropolitan Board of Exercise* v. *John Barrie et als.*, 34 N. Y., 657; *Calder* v. *Kirby*, 5 Gray, 597; *Commonwealth* v. *Brennan*, 103 Mass., 70; *Adams* v. *Hackett*, 7 Fost., 289; *State* v. *Phalen*, 3 Harr., 441; *Boyd* v. *The State*, 46 Ala., 329.

On this question we express no opinion, deeming the view we have taken conclusive of the case and satisfactory. It will be time enough to decide the question of contract when it is fairly presented.

Let the judgment be affirmed.

Upon a petition to rehear, FREEMAN, J., said:

A respectful petition for rehearing is presented in this case, presenting several questions not urged in the former argument of the case, which we proceed to dispose of.

First, a slight error of fact is pointed out, the opinion saying the agreed case showed that Hartsville had not accepted the benefits provided by the taxing district system. We correct that by saying the agreed case does not show that Hartsville has accepted the benefits of such an organization.

It is now urged that we must assume the fact to be that Hartsville is a taxing district by virtue of sec. 1, ch. 11 of the bill to establish taxing districts. That section is, "that the several communities embraced in the territorial limits of all such municipal corporations in this State as have had or may have their charters abolished, or may surrender the same under the provisions of this act, are hereby created taxing districts, in order to provide for local government," etc.

Several difficulties are in the way of this view. First, it is expressly provided by the act repealing the charter that the inhabitants shall be entitled to the benefits of a "taxing district, should the citizens thereof see proper to avail themselves of such benefit." It is assumed by the Legislature to be optional with the town to do so, and in fact is so enacted. We cannot presume that choice has been made in favor of a taxing district system. It is a question of fact,

and would have to be shown. The repealing act settles this.

Another question, however, is now for the first time presented, but which is fairly raised by the facts of the agreed case. It is, that the act repealing the charter of the town of Hartsville did not take effect until forty days after its passage, under art. 2, sec. 20 of the Constitution of 1870. The act was passed March 28, 1879, and approved by the Governor on the 31st. The whisky in this case is charged to have been sold on the first day of May, 1879, consequently in less than forty days after the passage of the law. The concluding clause of the statute is, "that this act shall take effect from and after its passage." The clause of the Constitution referred to is, "No law of a general nature shall take effect until forty days after its passage, unless the same or the caption shall state that the public welfare requires it should take effect sooner."

Now if this was a general law, in the sense of the Constitution, it would be clear the law could not take effect till forty days after its passage. But then a law repealing the charter of a village is not a general law, one equally operative in every part of the State, or upon all individuals who may bring themselves within its provisions. No town in the State could be effected by this repeal except the town of Hartsville, nor was intended to be. It is as special as a law can be, operating upon only one single village of the State. It, therefore, is not included in this provision of the Constitution—and the objection

fails. As to the objection that it does not appear that the institution of learning was organized under the law, etc., we need but say that the fact of its existence is found by the jury, and is assumed by the whole facts of the case. We do not think this question is now properly presented, nor the objection sustainable if it could be done.

As to whether the presentment was found on information of a member of the grand jury we need not determine, as the question should have been raised by a plea in abatement. On the whole case we see nothing in the objections now presented, and dismiss the petition.

Duck River Valley Narrow Gauge R. R. Co. in error *v.* W. W. Cochrane.

1. Action. *Damages. Railroad.* For land appropriated for the building of a railroad chartered under the general law since the Constitution of 1870, the owner may commence suit by petition for a jury of inquest, or he may bring an action on the facts of the case to recover the value of the land and damages.

2. Railroad. *Quantity of land appropriated.* The entry and construction of the road without taking any steps to condemn the land, will be regarded as an appropriation of so much of the land as the law authorized.

3. SAME. *Same. Description of land by jury. When sufficient.* The description of the land by the jury as fifty feet from the center of the railroad track on each side is sufficient. It need not be by metes and bounds. The road-bed is a permanent land mark, and fifty feet from the center may be rendered certain.

FROM MAURY.

Appeal in error from the Circuit Court of Maury county. W. S. MCLEMORE. J.

LEWIS BROS. for Railroad.

G. P. FRIERSON for Cochrane.

MCFARLAND, J., delivered the opinion of the court.

This was an action begun by Cochrane in the circuit court to recover damages for land taken and appropriated by the railroad company in constructing its road across his farm. It is in form an ordinary action of trespass, one count of the declaration setting out substantially the facts of the case. The first question made is, that the remedy given by our statutes and by the charter of the company is exclusive of all other remedies.

It was held by this court in the case of *John Calcough* v. *The N. & N. W. R. R. Co.*, 2 Head, 171, that the remedy pointed out by the charter was in general, not cumulative, but to be taken as exclusive. And the same holding was adopted in other cases. But upon the enactment of our Code in 1858, general provisions applicable to all persons or corporations authorized to take private property were adopted. See sec. 1325 *et seq.*

The remedy pointed out is substantially similar to the remedy given in the charters of the leading railroad companies, that is, by petition to the circuit court, a jury of inquest, etc. After pointing out specifically by the company, sec. 1347 provides as follows: "If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had as near as may be, as hereinbefore provided; *or he may sue for damage in the ordinary way*, in which case the jury shall lay off the land by metes and bounds, and assess the damages as upon the trial of an appeal from the return of a jury of inquest."

The latter clause of this section leaves no doubt as to the right of the owner to bring an action in the ordinary way, which can mean nothing else than an action of trespass or an action upon the facts of the case to recover the value of the land and the damages.

The decisions referred to holding the statutory remedy exclusive were made upon cases previously arising under special charters, and could not have been made in reference to the foregoing section of the Code.

Subsequent to this, however, and after the Constitution of 1870 had forbidden the granting of special charters, the Legislature passed general laws, under which the Duck River Valley Narrow Gauge Railroad Company was organized, and this act also points out the mode to be pursued by companies organized under

it for condemning private property, the mode pointed out being in substance the same as that pointed out by the Code before referred to (sec. 1325 *et seq.*), except the provisions of 1347 are not embraced. See the act of January 26, 1871, T. & S. Statutes, 507. The remedy provided by this last named act relates alone to proceedings to be instituted by the companies, and provides that such corporation, when organized, may proceed to take and appropriate property in that mode and in no other. No allusion, however, is made to proceeding to be instituted by the *land owners*, except to provide that they shall commence "their proceedings" within twelve months; what proceedings they may commence are not defined. We hold that this does not, by implication or otherwise, repeal the general provisions of sec. 1347, which gives the land owner his option to proceed by petition in the statutory mode, or by suit in the ordinary mode. There was no error, therefore, in the action of the circuit court in holding that it had jurisdiction of the case.

The next ground of error assigned is as follows: By the provisions of the acts of the Legislature under which the present railroad company was organized, with its amendments, the company had the right to take and appropriate, for the right of way, not exceeding one hundred feet in width. The company, however, failed to institute any proceedings, or in any manner designate the land desired, but simply entered upon and constructed their road through the plaintiff's land without more. Upon the trial the company insisted

that they had the option to take less than one hundred feet, and that in the present action it was only liable for the land actually occupied. The circuit judge instructed the jury that if in the construction of the road the company had used the land as far as fifty feet on one side at any point, this might be regarded as an election to take the fifty feet on both sides the entire length, and the jury laid off the land and gave damages accordingly. We think the conclusion reached by the judge and jury was correct, though not precisely for the reason given by the judge. Assuming that the company might, by following the statute, have taken and appropriated at its option less than one hundred feet, yet having failed in any manner to designate the land to be appropriated, their entry and the construction of their road must be regarded as an appropriation of so much of the land as the law authorized. It is manifest that the jury could have no other rule, unless they be confined to the actual roadbed. And as between this rule and the one hundred feet provided by the law, we think the latter should control.

Next, the objection is made that the jury have not designated the land by metes and bounds. They designated fifty feet from the center of the railroad track on each side. This is sufficient, the road is a permanent land mark, and fifty feet from the center may be rendered certain. The rule of damages was correctly given, or if there was error it was not against the defendant. We cannot disturb the finding of the jury as to the amount of damages. This was a ques-

tion for them, and there is evidence to support the verdict.

Affirm the judgment. It should be so amended, however, as to vest the defendant with title to the land.

PATTERSON *v.* HAWKINS.

RENTS. *Attachment.* Plaintiff rented defendant land for one-third of the crop. Owing to bad cultivation only three bales of cotton was raised. Plaintiff attaches *all* the cotton, and the court renders judgment for rent, estimating what might have been raised by good husbandry. Held, erroneous. Damages for breach of contract cannot be enforced by attachment under sections of the Code giving attachments for rent.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. JOHN V. WRIGHT, J.

B. F. MATTHEWS for Patterson.

N. SMITHSON for Hawkins.

FREEMAN, J., delivered the opinion of the court.

This is a proceeding by original attachment, claiming defendant is indebted to the plaintiff in the sum

of $170 for the rent of land for the year 1874. The case was tried on appeal by Judge Wright at Pulaski, a judgment rendered for the plaintiff for $141.93, and appeal in error to this court.

The facts are, plaintiff rented land to defendant for the year 1874, and was to receive as rent one-third of the crop. The corn crop proved a failure, the cotton crop was three bales, which, under the judgment of the court, plaintiff gets, or its equivalent, the proceeds thereof, it having been sold. The court gave this judgment as for rent, estimating what should have been made by good husbandry on the land.

This judgment is erroneous. By secs. 3539–41 of the Code, any debt by note, account, or otherwise, created for rent of land, is a lien on the crop growing or made on the premises, in preference to all other debts, from the date of the contract, and continues for three months after the debt becomes due, and until the termination of any suit commenced within that time for the rent. This lien may be enforced by original attachment, issued on affidavit that the rent is due and unpaid, or defendant about to remove or sell the crop, or by judgment at law against the tenant, and execution to be levied on the crop in whosesoever hands it may be.

It does not admit of argument that this remedy by attachment is not given on the basis contended for by the plaintiff. Whatever may be his rights in an action on the case for failure to comply with the express or implied contract for good husbandry on the part of the tenant, it is certain the damages for such

breach of contract is not meant under these sections, and could not be enforced as such by this proceeding. By the contract in this case the party was only entitled, as rent, to one-third of the crop made, be it much or little. If that failed, to be delivered according to contract, then on such failure the party would only be entitled to recover its value, and this probably might be treated as rent, and as due "otherwise" than by note or account, under the language of the statute. Be this as it may, it is certain the claim here made cannot be sustained and enforced in this proceeding.

Reverse the judgment and remand.

3L 485
7L 514
8L 484
1pi 278

GEO. W. MCGREW *v.* G. B. REASONS.

1. JUDGMENT. *Barred by statute of limitation of ten years.* Judgments of a justice of the peace, as well as judgments of a court of record, are barred by the statute of limitations of ten years.

2. SAME. *Same. Execution. Certiorari and supersedeas.* Execution based upon such a judgment of the justice of the peace may be quashed in the circuit court upon petition for *certiorari* and *supersedeas*.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. W. S. MCLEMORE, J.

N. SMITHSON for McGrew.

J. C. LESTER for Reasons.

FREEMAN, J., delivered the opinion of the court.

This is a petition for *certiorari* and *supersedeas*, seeking to have a certain judgment before a magistrate declared void, and execution on the same quashed. The facts, as found in the petition and record are, that there appears a judgment on the docket of one Meredith, a justice of the peace for Giles county, in favor of McGrew against the present plaintiff for $35.93, rendered May 3, 1858. The docket appears regularly kept, and shows, under the title, "returning officer," the name of Lewis, a constable of the county, as the officer returning the warrant, also entries of various executions issued, the first in 1859, the last in October, 1878, which was superseded by this proceeding, commenced in November of that year. The claim of plaintiff for relief is based on the allegations, very definitely made, that he was never served with process, and never knew of the judgment until about a year before, when a constable informed him he had an execution on said judgment. It is also insisted that he not only did now owe McGrew, but that on the contrary McGrew owed him, at the date of the judgment. This comprises the ground of attack on the judgment as originally rendered.

It is then insisted the judgment was about nineteen or twenty years old when the execution was is-

sued, never had been revived within ten years, consequently was barred by our statute of limitations, Code, sec. 2776, providing actions on judgments and decrees of courts of record of this or any other State or Government, and all other cases not expressly provided for, shall be brought within ten years after the cause of action accrues. Plaintiff also relies on the presumption of payment arising from the lapse of sixteen years since the rendition of the judgment.

We need not discuss the question as to the judgment presented. The decision of the question of the statute of limitations is conclusive of the case in the view we have taken of it. Sec. 2776 of the Code provides that actions on judgments and decrees of courts of record of this or any other State or Government, "and all other cases not expressly provided for," shall be commenced within ten years after the cause of action accrues. This last clause includes judgments before a justice of the peace. It is intended to be a bar to its enforcement. To give it any effective operation we must hold that the issuance of an execution after the ten years is an action on said judgment, otherwise a party having such a judgment would never sue on it at all, so as to permit the bar of the statute to be interposed, and he might always, by his own testimony, rebut the presumption of payment in sixteen years, where both parties were living, by his own testimony, and then, by issuing an execution even at the end of twenty-five years, evade the bar of the statute.

It is argued the judgment should be revived by

sci. fa. before the ten years expired. But there would be an anomaly in such proceeding before the ten years had expired, for the judgment would be in full force and need no revivor, and after that time the statute would be interposed as a bar, and defeat it. It is true a suit might be brought on the judgment before the ten years, and then a party can always secure himself in such a case. If he fails to do so, then we think the time fixed by the statute should be effective to bar the enforcement of the judgment.

There is no more convenient or appropriate remedy than the one pursued in this case by *certiorari* and *supersedeas*. We therefore hold the execution was properly quashed for these reasons.

Upon petition to rehear FREEMAN, J., said:

Some weeks since an opinion was delivered in this case holding that an execution issued several years after (in this case nearly twenty years) the rendition of the judgment would be quashed when the case was brought before the court by *certiorari* and *supersedeas*. The principle on which this was held is, that sec. 2776 of the Code, prescribing the term of ten years as the period of limitation to judgments of courts of record, and then adding, "and all other cases not expressly provided for, within ten years after the cause of action accrued," applied to judgments before justices of the peace. These judgments not being otherwise provided for, must be included, or else we have the anomaly of a bar provided for judgment of the higher

grade, to-wit., of record, yet none for those of inferior dignity whatever. This, we think, was not intended.

We have carefully examined the argument of counsel, probably interested in the question, who now file briefs in this case. We find nothing new in them beyond what was urged substantially on the original argument. The question presented is simply one of construction. The Legislature has said that ten years shall be a bar to an action on a judgment. Shall the issuance of an execution after ten years be held equivalent to an action, and the bar made effective, or shall we hold it can only be used when a new suit is brought on the judgment? The Legislature certainly intended ten years to be as effective against judgments as six years was on a contract. We look to the nature of the thing to be barred. It is a judgment on which, by our law, an execution could be issued at any time without *sci. fa.*, or further step. This had long been the law when the Code was enacted. It is well known that suits have been seldom brought on domestic judgments in view of this, that is, simply actions to have another judgment. Now, as we said before, if the statute is to be practically effective as a bar to judgments, it must be allowed to be interposed to their enforcement by the usual means by which this is done, that is by execution. If not, a party having a judgment would never sue on his judgment at all, only issue execution, and thus evade the bar fixed by the Legislature. In this way his judgment could be enforced, it might be twenty-

five years after its rendition, there being only a disputable presumption of payment, as heretofore held, after sixteen years, which might be rebutted by satisfactory proof that in fact it had not been paid. This view was intimated by Judge Nicholson in the case of *Lain* v. *Lain*, 3 Baxter, 31, 32, where he decides that "a *sci. fa.* was proper after ten years, and it was a matter of justice to the defendant that he might resist it by pleading the statute of limitations of ten years." It is true the statute had not been pleaded in that case, but the reason given why a *sci. fa.* was proper is in harmony with the view we have taken. If a *sci. fa.* was proper after ten years, as held in that case, and the defendant might then interpose the plea of ten years to bar it, it may as well be done by the form of proceeding adopted in this case. Under that case, we should be compelled to quash the execution for want of having been proceeded by *sci. fa.* to have execution after the ten years, and then when the party resorts to the *sci. fa.* the bar will defeat him, so he will have two suits instead of one. If the principle of that case be correct, then the conclusion in this is in accord with it. We do not arbitrarily create the bar. The Legislature enacted it, and fixed the period at ten years as to judgments. We only give such construction to the enactment as shall make the enactment practically effective in the attainment of the end prescribed. The policy of the enactment was for the Legislature. When adopted by that body it is the duty of the court to aid in

making it efficient. This we do by the construction we have given, and the practice we have sanctioned.

Dismiss the petition.

3L 491
7L 719

GREEN & FITZHUGH *v.* SAMUEL PERKINS AND J. S. CLAYBROOK.

CONTRACT. *Void without consideration. Damages. Minors.* A father and two minor sons were injured by a turnpike being out of repair. A compromise was made by some of the stockholders and the father, and a written instrument executed to the father, agreeing on the part of the company to pay the father the sum of $2,500 "in full of all claim for damages against said company" on the part of the father and his two sons. Held, no recovery could be had on this instrument. It was without consideration so far as the damages due the minors were concerned, and it being impossible to separate them from the damages which might be due the father, the contract being one, no legal obligation existed.

FROM WILLIAMSON.

Appeal in error from the Circuit Court of Williamson county. W. S. MCLEMORE, J.

T. W. TURLEY for plaintiffs.

J. G. WALLACE and A. L. DEMOSS for defendants.

FREEEAN, J., delivered the opinion of the court.

This suit was brought against the above named defendants, together with Nashville & Nolensville Turnpike Co., on the following undertaking·

"The undersigned, for and on behalf of the Nashville & Nolensville Turnpike Co., hereby agree to pay Geo. W. Morton $2,500, and to pay the same from the first funds that come into the treasury of the company, after paying current expenses, all to be paid inside of four months, which is in full of all claims for damages against said company on the part of said Morton and his children, Robert and William, on account of falling into a gulley in the road on the 29th of July, 1877. September 4, 1877. Signed, Samuel Perkins and John S. Claybrook."

This instrument is declared on in one count in the declaration simply as a promissory note, payable to said Morton, and assigned by him to plaintiffs on the 8th of October, 1877, so that the question is, whether defendants, under the facts and the law, are liable to pay said sum of money by reason of the above instrument. A verdict was found in favor of the company, from which there is no appeal, which ends the matter so far as the company is sought to be made liable on this writing.

The facts necessary to be stated are, that Morton and his two sons, one about twelve and the other fourteen years of age, had been hurt by the overturning of a buggy in which they were traveling on the turnpike, and damages were claimed for the injury. The

matter was submitted to three persons as arbitrators, the case heard, both parties being represented by counsel. The arbitrators did not readily agree—separated on the first day, and were to meet next day for discussion and decision. When they met the two defendants, Perkins and Claybrook, who were stockholders in the company, proposed a compromise, the result of which was the above instrument executed by them. Morton at the same time executed an instrument acknowledging the receipt of the above contract, signed by the parties for and on behalf of the company, giving its terms, and then says, "which is in full of all claims for damages against said company on the part of myself (that is Morton) and my two children, Robert and William, on account of falling into a gulley on the road" at the date above referred to. This was signed by Morton and given to the parties, to be sent to the company.

Without going into further details of the testimony, it suffices to say the company declined to ratify the act of Perkins and Claybrook, or to pay the money, and this suit was commenced to enforce the supposed liability. The case must turn on the propriety of his Honor, the circuit judge's instructions to the jury, or refusal to give instructions asked by counsel, inasmuch as on the matters of fact contested before the jury, their finding would probably have been conclusive either way.

The court was requested to charge substantially that if the obligation was given in consideration of damages done to Morton and his two minor children, and

the amount of damages were included in the same, not separated, but mixed, so as to be indistinguishable the one from the other, then plaintiffs could not recover, the plaintiffs having notice of the refusal of the company to pay, etc. This, with other instructions asked, raised fairly the question as to whether the defendants would be liable on the promise to pay Morton, the father, the damages to which his children would be entitled for the injury sustained by them. The instrument on its face showed the damages were not distinguished, but a gross sum was agreed on as the amount to be paid Morton and also his children, Robert and William. It is impossible to say how much was agreed to be due the father, or how much for injuries done his children, or either of them. It being impossible to separate the elements constituting the consideration of the contract it must stand, or fall if any essential part of it is insufficient.

We do not see how it can be supported, unless we disregard the time-honered rule of our law, that a consideration, either in something of value, or benefit, or advantage to the party promising, or of disadvantage to the other party, is always necessary to sustain an undertaking. The payment to Morton, the father, would not have relieved the company in the slightest from its liability to respond in damages at the suit of the children. That suit might be brought either during minority by next friend, or within one year after arriving at majority. See *Whirley* v. *Whiteman*, 1 Head, 610. This being so, assuming that defendants were so connected with the company as to

be interested and benefitted directly by the settlement of these damages, still they obtain no legal advantage and receive none. If the company itself had undertaken to pay the father the damages due his children on his simple receipt, as is the contention of plaintiff in this case, it is not seen on what consideration this promise could have rested for its support as a contract. It would be a simple gratuity on the part of the company, if paid, so far as its legal results are concerned. The precise same legal liability would remain to the children as before the payment. This being so, it follows inevitably that the promise to make such payment must be held a mere *nudum pactum*, lacking the essential element of a consideration to raise it to the dignity of a contract enforceable by our law. It can scarcely be claimed that the promise of these stockholders can stand on higher ground on this aspect of the question.

Authorities need not be cited to show that a promise or undertaking, unsupported by a consideration, imposes no legal liability. The principle is axiomatic—need only be stated to be assented to. We are totally unable to see any consideration for this undertaking, so far as the damages due the minor children are concerned, and it is impossible to separate these from what might have been due the father, and so the contract being one, this essential element failing, it must be held to raise no legal obligation.

We need not discuss other questions presented in the record, such as whether the promise in the instrument can be held, in any aspect of it, as one fixing

a personal liability, a question which seems to me more than doubtful. The above is, however, conclusive of the result.

The judgment must be reversed and the cause remanded for a new trial.

3L 496
6L 152
8L 418
10L 589
10L 675
11L 715

WILLIAM A. PORTER *v.* THE STATE.

1. CRIMINAL LAW. *Change of Venue.* Upon application to change the venue in a criminal case, the Judge may call witnesses to prove that a fair and impartial trial may be had in the county. He is not compelled to take the affidavits presented with the application, nor confine his examination to those witnesses, but may call witnesses from different parts of the county and examine them to satisfy him as to the propriety of the change.

2. SAME. *Continuance. Affidavit.* If a continuance is refused upon an affidavit alleging sufficient grounds for a continuance, but upon the trial it is made to appear that the affidavit was false, this court will not reverse.

FROM MARSHALL.

Appeal in error from the Circuit Court of Marshall county. W. S. MCLEMORE, J.

LEWIS BROS. for Porter.

ATTORNEY GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

The plaintiff in error was convicted in the Circuit Court of Marshall county, at its June term, 1879, of an assault with intent to kill, and sentenced to fifteen years in the penitentiary. A new trial was refused, and he has appealed to this court.

His counsel insists that the judgment should be reversed:

1. Because of a refusal by the court to change the venue upon the prisoner's application and affidavits introduced by him.

2. For refusal of the presiding judge to grant a continuance.

3. For error in admitting and rejecting certain testimony.

4. Because the State's material witnesses were discredited by being contradicted by the other witnesses in the cause, and that the verdict is therefore not sustained by the evidence.

The defendant below and four others, citizens of the county, made affidavits that they did not believe that defendant could get a fair and impartial trial in said county, owing to excitement and prejudice against him. His Honor further interrogated affiants in open court, and also other citizens from different parts of said county, and from such examination was satisfied the application should not be granted.

The statute provides that the venue may be changed "when upon the application of a defendant in a felony case, it is made to appear satisfactorily to the court that, from undue excitement against the prisoner in the county in which the offense was committed, or any other cause, a fair trial could not be had." Code, section 5195.

Exception was taken, also, to the examination by the court, upon the application for change of venue, of other citizens of the county than those whose affidavits were presented by the defendant. According to the statute cited, it must be made to appear satisfactorily to court, that good grounds exist for a change of venue. The application is addressed to the sound discretion of the court. He must decide whether such a state of feeling against the defendant exists, as will probably deprive him of the benefit of a fair and impartial trial. Nor is he bound to assume the fact to be so, upon the *ex parte* statements contained in affidavits which may be made, as it appears was done in this case, by the special friends and relatives of the applicant. He may avail himself of other sources of information, and perhaps the practice adopted in this case was as unobjectionable a method, to ascertain the truth, as could have been adopted. And although the method adopted was unusual in our practice, we think there can be no valid objection to it. The court is charged with the ascertainment of a fact, upon which he is required to act, and it cannot be held to be erroneous to resort to means likely to furnish the basis of a correct judgment.

It has been held by this court, that while the refusal of the judge to change the venue upon application of defendant, may be reversed, yet it would require a strong case of error and abuse of his discretion, to warrant this court in reversing his action. 1 Swan, 325; 3 Col., 355; 11 Heis., 223.

We do not think this is a case calling for the intervention of this court upon this point. The judge has not abused his discretion in refusing to change the venue, and there was no error in such refusal. The change of venue having been refused, defendant then filed his affidavit for a continuance.

The indictment was found at February term, 1879. At that term the cause was continued by consent and tried at next June term. The grounds stated for continuance are, first, on account of the excitement against him; second, that he has just learned that one Champ will testify that defendant admitted that he had committed the offense charged, and that "he is informed and believes that he can prove by one Dan Madison and Dr. Cunningham, who were present when the alleged admission was made, that no such admission was in fact made;" third, that Mrs. Helen Stepps, who has been summoned, is sick and unable to attend, and will prove an alibi; fourth, also one Ben Coleman, who was summoned and is not in attendance, will, he expects, "prove such facts as will show that another man very probably did the shooting."

Under the act of 1827, Code, section 5208, a defendant was entitled to a continuance upon the ground of excitement against him. But in 1875, an act was

passed by the Legislature, leaving it to the sound discretion of the court to determine whether a continuance should be granted for this, instead of an imperative requirement, as the act of 1827 had been construed to be.

The second cause for continuance was the absence of Dan Madison and Dr. Cunningham, who were present, as alleged in the affidavit, when the alleged admission of guilt was made by defendant. Witness Champ did testify, as defendant supposed he would, that he had admitted to witness that he had shot Neal. He was not asked on cross-examination, if any one was present when the admission was made. But Champ says it was made while he and defendant were riding together to a trial in the neighborhood. Dr. Cunningham was also examined as a witness in the case, and was not asked any question as to any conversation between witness, Champ and defendant, nor as to his being present at any time with them. These facts, we are of opinion, show that his affidavit was false in respect to his alleged expectation that he could contradict Champ's statement by Dr. Cunningham and Madison. Mrs. Helen Stepps, who was stated to be sick at home, was present and examined as a witness for defendant.

The last ground for a continuance, is the absence of Ben. Coleman, by whom witness expects to prove *such facts* as will show that another very probably did the shooting. He does not say he can prove another man did the shooting, but still the affidavit does show upon its face sufficient ground for a continuance, and

we think it would have well justified the court in granting it. But we have held, that is cases where sufficient *prima facie* cause for a continuance has been shown on affidavit, which has been refused by the court below, this court will not reverse, if upon the trial of the cause, it satisfactorily appears that the grounds upon which the continuance was asked were false, and fabricated for the purpose of obtaining delay, and such, we think, are the aspects of this case.

As to the contradictions of the material State's witnesses by proof of statements out of court, different from their evidence in court, we attach, under the peculiar circumstances of this case, but little importance to them. In most cases they admit the contradiction, and give as a reason for stating that they did not recognize defendant when he shot, as to part of such statements, that he was at large and they did not wish to publish that he was known, lest he might flee the country or do them personal harm. And in other cases, that the inquiries were made by his friends, and that they did not wish to disclose facts, that they knew, to them.

Upon the trial, three witnesses testify that they saw and recognized defendant as the man who shot Neal. Neal's barn was set on fire, and defendant secreted himself behind a picket fence where there was an opening in the fence some twelve or fifteen inches wide. As Neal rushed from his house toward his barn, about 10½ o'clock at night, followed by McKinney, his wife and a negro woman, he was shot by defendant, who was twenty-one yards off. He fell,

and by the brilliant light from his burning barn, saw defendant with his gun raised as if about to shoot again, and exclaimed "Porter has shot me." Neal's wife did not identify him, but McKinney and the negro girl did, and all three swear he was the man that shot Neal. Defendant was traced through the field into the woods, and there were found the tracks of a running horse with one hind foot bare and the other with a shoe on with a swelled heel, corresponding exactly with the tracks made by defendant's horse. The tracks in the field were not identified by any peculiar mark, but were proved to correspond in size with those of defendant. And along the line of his retreat was found a picture, in a day or two after the shooting, which was identified by a witness as one given to defendant by the witness a day or two before the shooting occurred. He told Champ that he shot Neal but once, but that the second barrel of his gun was accidentally discharged as he was making his escape, and a man in the neighborhood heard two shots. On Friday evening he took his gun from its rack over the door and left it in the stable at Stepps', where he and Champ were staying. A negro boy found it in the stable and was bringing it to the house, and defendant made him take it back to the stable. Defendant had previously made threats against Neal, who had him arrested for horse-stealing, and on Saturday when he was arrested, he had his horse saddled and hitched in a cedar thicket, a quarter of a mile from Stepps' house, where he was.

Against this strong array of direct and circumstantial evidence against defendant, we have not the slightest contradiction, except the contradictory statements of the witnesses for the State hereinbefore commented on, and the testimony of Stepps, his wife and niece, tending to establish an *alibi*. This testimony is in substance, that defendant was at Stepps' house on Friday night, the night on which the shooting was done, and about 8 o'clock at night he went up stairs, leading from the room in which Stepps, his wife and niece slept, to his own bed room, immediately over the family room; that he left his shoes in Stepps' room, and the only egress from defendant's room was through Stepps' room, through a door upon the stairs, which Stepps says he had buttoned on the side in his room; that the family heard defendant several times in his room during the night, and spoke to him and were answered by him. And Stepps states that about half after ten, he went into defendant's room, felt him in bed, spoke to him and he was answered by him. Stepps says there were two small windows in defendant's room, with 4 by 10 panes of glass in each, and they say that these windows were nailed with large nails and could not be moved. Another witness, however, states that a day or two after the arrest of defendant, he saw under one of these windows, prints of mud on the logs of the house leading from the ground to the window, and he climbed up the wall easily and entered through the window into the room, the window not being fastened, as described by the three witnesses for defendant.

It was seven or eight miles from Stepps' house to Neal's, and Stepps swears, and is sustained by his wife and partly by his niece, that defendant was at his house at 10½ o'clock, about the hour at which all the evidence shows Neal was shot. If this be true, it would be physically impossible that defendant did the shooting. The testimony of these three witnesses cannot be reconciled with the other testimony in the cause, and the jury did not believe it, and we are of opinion that they were warranted from the other evidence in the cause in discrediting it.

Upon a careful examination of the whole case, we are satisfied that the verdict of the jury is fully sustained by the evidence.

The charge of the court was full, fair and correct, and there is no such error in the record as makes it our duty to reverse the judgment, and it will be affirmed.

A. Baker *v.* H. C. Harlan, Trustee, *et als.*

1. Deed of Trust. *Mistake. Amendment.* A debtor directed his attorney to prepare a deed of trust to secure certain creditors whose names were furnished the attorney; the deed was prepared, acknowledged, and accepted by the trustee. The next day it was observed that the attorney had omitted the name of one of the creditors, and an amended deed was executed, showing the facts, acknowledged and registered with the original deed of trust; *held*, that such an amendment could not be made after the acceptance of the deed, except by consent of the trustee and the beneficiaries.

2. Same. *Equity Jurisdiction. Mutual mistake.* In such a case a court of equity cannot correct the mistake, for it is not a case of mutual mistake.

FROM MAURY.

Appeal from the Chancery Court at Columbia. W. S. Fleming, Ch.

W. B. Gordon for complainant.

E. H. Hatcher for defendants.

McFarland, J., delivered the opinion of the court.

This was an agreed case submitted to the Chancery Court at Columbia, showing the following facts: George Lipscomb directed his attorney, L. D. Myers, to prepare a deed of trust conveying to H. C. Harlan, trustee, a tract of land to secure a number of creditors, and furnished him a list of the creditors to be secured and their debts. The deed was drawn and executed, and acknowledged by Lipscomb on the 15th of February, 1876, and filed for registration on the

same day. On the next day, the 16th, H. C. Harlan, the trustee, in writing accepted the trust, and it is to be fairly assumed that this acceptance was in behalf of the creditors secured.

By the terms of the deed the trustee was authorized to sell if the debts were not paid by the 1st of March, 1877. He was also given power to sell at private sale at any time after the first of June, 1876, when in his judgment he could obtain a full and fair price for the land. On the next day after the trustee had accepted the trust, Lipscomb discovered that the draftsman of the deed had unintentionally left out a debt embraced in the list furnished him, due to A. Barker, and on that day (the 17th February, 1876,) executed an amendment of the deed, as it is called, showing the fact, and directing that Barker's debt be included and paid with the others. This paper was acknowledged and filed for registration the same day and was registered with the original deed.

After the property was sold, a controversy arose as to whether Barker was entitled to participate in the proceeds of the property, when this agreed case was made and submitted to the Chancellor, who decided in favor of Barker, and from this decree the trustee and one of the creditors have appealed.

It is admitted that it was the intention of Lipscomb to include the debt of Barker with the others, and it was left out by the mistake of the draftsman. The correction was made after the trustee had accepted the trust, and without his knowledge or consent, or that of the beneficiaries.

The question is, whether the mistake was one that the bargainor, Lipscomb, had any power to correct (without the consent of the other parties) at the time he attempted to do so. It may be readily conceded, that if the mistake was one that a court of chancery would have corrected, that the bargainor might voluntarily make the correction without resort to the court.

It may also be further conceded, and such I have no doubt is the law, that if it was understood and agreed between Lipscomb and the trustee and creditors secured, that the debt of Barker was to be included, and it was by mistake omitted, then the correction could be made, for in that case the mistake would have been the mistake of all parties. And the other creditors could not rightfuly object to the correction being made, so as to make the deed conform to the previous agreement and understanding of all the parties. This I think is the point upon which the case turns, and the agreed case fails to show that either the trustee or any of the beneficiaries were parties to any negotiations previous to the execution of the deed, or that they had any knowledge of the purpose of Lipscomb to secure Barker's debt, or ever assented that the deed should be so executed. It does affirmatively appear that they did not assent to the correction.

The deed in the form it was first executed was presented to the trustee, and without any knowledge upon his part or upon the part of the beneficiaries that there was any mistake, or any debt omitted, its provisions were accepted. After this, had the bargainor any control over the matter? It seems to me

that it became at once, from the acceptance of the trustee, a complete executed contract, and after that it could not be changed without the consent of both parties. There are authorities holding that before acceptance, an assignment for the benefit of creditors is is in the nature of a power and revocable, but I believe that all the authorities agree, that after acceptance, it is irrevocable, and the bargainor has no more power to change the terms of such an assignment, than he would have to change the terms of any other abstract conveyance; and it does not alter the case that it was *his* purpose to have made the conveyance differently.

A mistake of this character, to be the subject of correction, must appear to have been a *mutual* mistake, not merely the oversight of one of the parties. By the acceptance of the benefits of the deed, the creditors therein secured became bound by its terms, at least in respect to the property conveyed, and bound to wait the time specified. They did this in ignorance of the fact that another debt was to be included. Had this been understood, they might have refused the benefits of the deed and secured themselves otherwise. They have the right to stand upon the terms of the contract as accepted and assented to then, and resist any change made without their assent. It is said they were informed that the correction was made before any change in the circumstances or rights of the creditors. How this is, cannot be known. The alteration was made after their acceptance. If we assume that this gave them the right to revoke

their acceptance, we cannot know what legal advantage they may have thereby lost. But aside from this, the acceptance of the benefits of the deed gave the creditors named a specific lien and a fixed right, and they were not bound to release it.

It is said that this holding is to allow the creditors embraced in the deed as first executed, to take advantage of the mistake of the draftsman, but they simply stand upon the contract as they assented to it. There was no fraud or mistake upon their part, and no undue advantage taken by them of Barker, whose debt was omitted. A creditor has the right to stand upon a legal advantage fairly obtained.

The deed, when accepted, passed all title out of the bargainor; the conveyance was irrevocable, and it was not a case of mutual mistake for the correction of a court of equity.

I am opinion that the decre of the Chancellor should be reversed. The majority concurring, it is so ordered.

E. WILLIAMS *et als.* *v.* JOHN KIRKMAN AND UNION BANK.

EVIDENCE. *Positive and Negative Testimony.* If two persons, parties to a transaction, are called to testify and the one swears positively that it did transpire and the other as positively that it did not, the testimony of each is positive and the question is then one of credit, and the rule of law as to positive and negative testimony does not apply.

FROM MAURY.

Appeal from the Chancery Court at Columbia. H. WARD, Sp. Ch.

E. C. MCDOWELL and G. T. HUGHES for complainants.

I. N. BARNETT and E. H. EAST for defendants.

TURNEY, J., delivered the opinion of the court.

The pleadings make no question on the validity of the judgment, and we can therefore take no notice of objections made in argument.

The issues tendered are perhaps in some respects repetitions, but all contain facts necessary to the theory of the bill, and are therefore material.

Upon these issues questions of fact were submitted to a jury. The Chancellor charged the jury: "The rule of law requires greater weight to be given to positive than to negative testimony. For example, all other things being equal, if A swears positively that

a certain fact occurred and B swears it did not occur, the swearing of A is positive and that of B negative, and the greater weight, therefore, is to be given to the positive testimony of A. But if B swears positively to the existence or occurrence of any other fact which is wholly inconsistent and cannot be reconciled with the fact sworn to by A, then the testimony of B becomes positive and is entitled to as much weight as the testimony of A, and their testimony would be equally balanced."

This was error, because it assumes that positive testimony can only be to the affirmative of a fact or occurrence; whereas, on the contrary, positive testimony may as well deny the existence of a fact as assert its existence; as if two persons said to be parties to a transaction and the one compelled to know as much of it if it ever existed as the other, and being called on to testify, the one swears positively that it did transpire, and the other as positively that it did not, the testimony of each is positive, and the question then to be determined is one of credit, the rule of law as to positive and negative testimony does not apply.

For example, it is claimed by one witness that he bought of or sold to another an article of property, and he swears to the sale and its terms; the other swears that no such sale or purchase was ever made; the testimony of each is positive, and neither negative in the sense of the rule.

Reverse the decree and remand the cause.

Ezell *v.* Wright.

3L 512
12L 689

B. A. EZELL *et als.* *v.* JOHN D. WRIGHT *et als.*

MARRIED WOMAN. *Receipt for funds arising from sale of land.* Where a married woman goes in porson and, with her husband, gives a receipt for her share of the proceeds of land sold by decree of court for division, and directs the money to be credited on the husband's notes as purchaser at the sale, she has received the money in person within the meaning of the Code, section 3319, although no money was in fact counted out to her; and, nothing further appearing, she will thereby acquire no interest in the land as against the husband's creditors, especially if the facts be reported to the court and confirmed.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

W. H. MCCALLUM for complainants.

J. A. TINNON for defendants.

COOPER, J., delivered the opinion of the court.

The complainants are judgment creditors of the defendant, John D. Wright, and, as such, filed this bill to subject to the satisfaction of their debts a tract of land as the equitable property of their debtor. Shortly after the filing of the bill, Mary E. Wright, the wife of John D. Wright, presented a petition, claiming the land by way of resulting trust, and asking to be made a party defendant for the purpose of asserting her rights. The complainants offered no ob-

jection, and an order was made accordingly. Afterwards, a statement of facts was agreed upon, the petition of Mary E. Wright being treated as an answer, and the cause was heard by the Chancellor, who rendered a decree in favor of the complainants. Wright and wife appealed.

Under a bill filed for the settlement and distribution of the estate of the father of Mary E. Wright, then Mary E. Bennett, to which she was a party, the land in controversy was sold on the 19th of October, 1866, and the defendant, John D. Wright, became the purchaser, paying $100 in cash, and giving his two notes, with security, to the clerk and master, for $1,604.23 each.

On the 3d of the succeeding month, a decree was entered in the cause confirming the sale, divesting the title to the land out of the heirs, and vesting it in John D. Wright, and ordering the clerk and master to make him a deed upon payment of the purchase money. By a subsequent report in the cause, which was confirmed, the share of the defendant, Mary E., who had intermarried with the defendant, John D. Wright, after the confirmation of the sale, in her father's estate was ascertained to be $2,748.13, and on the 11th of November, 1870, she and her husband joined in a receipt to the clerk and master of this sum of money as her share. No money was in fact paid, but the amount was simply credited upon John D. Wright's notes, leaving a balance of $1,095.84, which was afterwards paid by his surety. On the 23d of September, 1875, Mary E. Wright filed her

petition in that cause, praying that the lands bought by the husband be settled to her sole and separate use, and the petition was ordered to be filed reserving equities, but no further action has been taken thereon.

The land in controversy having been bought by the defendant, John D. Wright, and the title thereto having been divested out of the heirs and vested in him before his intermarriage with the defendant, Mary E., it is clear that the claim of the latter to the land by way of resulting trust necessarily fails. Resulting trusts can only arise upon the state of facts existing at the time of the purchase, and not afterwards. *Gee* v. *Gee*, 2 Sneed, 396; *McCall* v. *Flippin*, 2 Baxter, 161. A constructive trust may, however, arise by the use by a trustee, or other person occupying a fiduciary relation, of the funds of the beneficiary in paying for land already bought, and the beneficiary may have the option of following the fund into the land as against creditors. *Gannaway* v. *Tarpley*, 1 Col., 572; *Bloomer* v. *Bloomer*, 6 Baxt., 98; *Turner* v. *Petigrew*, 6 Hum., 438. Our decisions in this regard, so far as they give to the constructive beneficiary a superior right to the claims of creditors, is perhaps a departure from principle. *McCall* v. *Flippin*, 2 Baxt., 161. To bring this case within the rule, there must be an appropriation of trust money in violation of the trust.

The distributive share of Mary E. Wright in the money, into which the property of her father's estate had been converted under the decrees of the Chancery Court, was a fund which the husband might reduce

to possession, and thereby make it his property. Previous to our statutes touching such funds, he would have had the right to have demanded its payment to him by the clerk. The wife had only an equity to a settlement which required an application to the court to secure. This was changed by the act of 1852, ch. 166, sec. 3, brought into the Code in sections 2483, 3319, 3320, 4052. The first of these sections is more nearly in accord with the language of the original act, but the subsequent sections are in *pari materia*, and they must all be construed together. Thus construed, they forbid the payment out of court of the proceeds of the real or personal property of a married woman, except to her in person, or as she may direct upon privy examination, the direction to be reduced to writing and entered on the minutes of the court, or by power of attorney by husband and wife upon privy examination of the wife. These provisions of the statute law were intended to give the wife an opportunity to actively interpose in obtaining or investing the fund. Until this right has been exercised out of court, or determined in court by proper orders and decrees in the cause in which the fund was created, the money is subject to a trust in her favor, and she may follow it accordingly. *Bloomer* v. *Bloomer*, 6 Baxt., 98.

The question in this case, therefore, is, has the defendant, Mary E. Wright, herself appropriated the fund within the meaning of the statute, or has it been appropriated by a decree of the court so as to be conclusive upon her until set aside in some legal mode?

Neil v. *Smith*, 1 Lea, 371. The defendant, Mary E., in her petition, which is treated as an answer to the bill, after reciting the institution of the suit for the distribution of her father's property, and the subsequent proceedings down to the ascertainment of her share in the fund in court, says: "Her husband informed her of the amount then due to her from said estate, that she could now take the purchase of said land as had been agreed between them, and have the same settled upon and secured to her in her own right by deed or decree of the court, as the whole matter was still in court. Petitioner agreed to this, and in order to consummate the arrangement, came to Pulaski and signed the receipt to the clerk and master for her distributive share, dated November 11th, 1870, and directed the same to be credited upon said purchase money for said land, and to be vested in said land for her separate estate. This was the whole transaction."

She had previously in her petition stated that her husband informed her that he had made the purchase of the land for her, and the language of the clause quoted has reference to this statement. But there is no evidence of any agreement at any time between the husband and wife in relation to the land, and the wife's rights must turn upon the facts agreed upon in connection with the facts admitted by her answer. These facts, stripped of all statements not proven, are, that she came in person to Pulaski, signed the receipt for her distributive share, and directed the same to be credited upon the purchase money for the land. And

these facts, the agreed statement shows, were embodied in the subsequent report of the clerk and master to the court, which was confirmed.

It is obvious, therefore, that the wife was personally present when the receipt was given, and consented to the appropriation of the money in payment of her husband's notes, and that this action on her part was sanctioned by a decree of the court in that cause. No money, it is true, was in fact paid. It was considered as paid to her and repaid on the debt. Unless the court stands upon the letter of the statute, and requires the actual counting of the money, and delivery to the wife, what was done must be held to be a reasonable compliance with the terms of the law. The object of the statute was to give her notice of her rights, and to require some formal act on her part in person to the payment or appropriation of the money. In legal effect the money was paid to her in person, and she controlled and directed its appropriation, and, so far as appears, without any qualification or condition. The alleged understanding between her and her husband, if of any effect, was matter in avoidance which she was bound to prove. The fund was reduced to possession by the husband with the assent of the wife. Her own acts, as admitted, are conclusive on her, and the decree of the court confirming the report of what was done under her direction was, probably, equally conclusive, never having been appealed from or set aside in any legal mode.

There is no error in the decree of the Chancellor, and it must be affirmed with costs.

3L 518
9L 676
10L 133

ELIZABETH BUFORD *et als.* *v.* A. COX *et als.*

1. CLERK AND MASTER'S BONDS. *Sureties. Liability.* The sureties upon the several bonds of a Clerk and Master signed the bonds at different times and places; upon the meeting of the court several of them appeared before the Chancellor and acknowledged the same, others did not; *held*, that all were liable, those who did not acknowledge as well as those who did.

2. SAME. *Acknowledgment. Escrow.* After the acknowledgment of the bonds, the sureties thus acknowledging are precluded from the defense that the same was delivered as an escrow.

3. SAME. *Special Commissioner.* Where a bond is executed by the Clerk and Master as special commissioner, the sureties are liable for any default as special commissioner, though the Clerk and Master was never appointed special commissioner by a general appointment or by decree in the several causes in which he has acted as such.

4. SAME. *Sureties.* Where money or property came into the hands of the Clerk and Master by virtue of his official position otherwise than as commissioner or receiver, the sureties on his bond as Clerk and Master are liable.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

T. M. JONES, W. H. MCCALLUM, J. S. WILKES, E. T. TALIAFERRO and S. E. ROSE for complainants.

N. SMITHSON and J. A. TINNON for defendants.

MCFARLAND, J., delivered the opinion of the court.

The questions for determination in these causes are, 1st. Whether any of the defendants sued as the sure-

ties of A. Cox, former Clerk and Master of the Chancery Court at Pulaski, upon his several bonds, are, for any of the reasons set forth in their answers, to be released from liability.

A vacancy having occurred in the office of Clerk and Master at Pulaski, S. D. Frierson, Chancellor of the division, in vacation, to-wit, on the 2d of June, 1865, appointed said Cox to the office. The order of appointment shows that Cox gave the required bonds, and took and subscribed the proper oath, and the oath in due form appears in the record.

Four bonds were executed by said Cox and a number of sureties, dated the 29th of May, 1865. It is not denied that each of the several sureties sought to be charged thereon in fact signed said bonds at or about the time of Cox's appointment. They signed the bonds at different times and places, at the request of Cox; they did not then, however, appear before the Chancellor and acknowledge the execution of said bonds, nor does it in proof appear when said bonds were delivered to the Chancellor. When the court met in September, 1865, an order was made showing that said bonds were delivered to the Chancellor at the time of the appointment, and an attestation made by the Chancellor shows that all of the sureties except two, R. W. Pillow and P. T. Cox, then, on the 15th of September, 1865, appeared before the Chancellor and acknowledged the execution of the bonds to which their names had been previously signed and they were entered of record.

The defense in behalf of Pillow and E. T. Cox,

is upon the ground that they did not appear before the Chancellor and acknowledge the execution of the bonds. As to Pillow, it is also insisted that after first signing the bonds he changed his purpose and requested Cox to have his name erased, and refused to appear and acknowledge the execution of the bonds.

The argument is also made in behalf of several of the sureties that they executed and delivered the bonds to Cox in the first instance as escrows, to take effect upon condition that the bonds were executed by others, who failed to do so. This defense, however, is not very clearly set forth in the answers. It is insisted that the acknowledgment of the bonds before the Chancellor was upon the condition that the other sureties, E. T. Cox and Pillow, also acknowledged it.

It is very clear that all the sureties who appeared before the Chancellor and acknowledged the execution of the bonds on the 15th of September, are bound by their terms. If any condition had been annexed to their execution of the bonds in the first instance, they undoubtedly became bound from that time. It is clear that the Chancellor could not, and did not induct this Clerk and Master into office upon the faith of bonds which were to take effect only upon the condition specified. *The State* v. *MeLean*, 8 Heis., 22. In fact there is no proof to sustain such a condition, if it were even allowable. There is some proof of conversations in regard to the executions of the bonds in the first instance, to the effect that Cox expected or promised to obtain certain other persons as his sureties, but the proof fails to make a case of a delivery as an escrew,

to take effect upon the conditions named, even in regard to the execution of the bonds in the first instance, but after the acknowledgment, all such questions are precluded.

The only question, we think, admitting of much discussion, is in regard to the liability of E. T. Cox and Pillow, but we are of opinion that they are also liable. The record, we think, establishes that they executed the bonds in the first instance, and by their authority they were delivered, and upon the faith of said bonds A. Cox was inducted into office on the 2d of June, 1865, and his term of office began from that date.

It is true that the statute requires they shall be acknowledged before the Chancellor and entered at length upon the minutes of the court at the first term after the appointment, but all these provisions were intended to secure the public, to leave no room for questions or doubt as to the due execution of the bonds. It was not, however, intended that a failure to observe these directions should release the surety, when in fact he had executed the bonds and the clerk inducted into office upon the faith thereof. If there were any doubt of this upon general principles, that doubt is removed by sections 773, 774, 774, 776 of the Code, which in substance expressly declare, that where an officer acts under a bond or receives money or property, upon the faith of a bond which is not in the penalty payable or conditioned as required by law, or is otherwise defective, such bond is not void, but stands in the place of the official bond, and

the officer and his sureties are estopped to deny its validity.

We hold that there is no ground to discharge any of the sureties, except McClure, who was discharged upon a plea of bankruptcy, and as to whom there was no appeal. There were four bonds executed, the two for securing fines and forfeitures and public taxes, need not be noticed. 3d. A bond in the penalty of $10,000, conditioned to well and truly keep the records of said office and faithfully discharge the duties of said office according to law during his term. This is the regular statutory bond as Clerk and Master. 4th. A bond in the penal sum of $25,000, conditioned to collect and pay over moneys by him collected, as commissioner of said court, under any order of said court, and well and truly make his return as commissioner. This was intended to meet the requirement of the act of 1849, ch. 150, sec. 2, Code, section 328.

It is argued upon behalf of the sureties upon this last named bond, that they are not liable for any default of Cox as special commissioner, because he was never appointed special commissioner, either by a general appointment or by decree in the several cases in which he acted. The Chancellor held that this was not necessary, but the liability attached in all cases where the duties performed by Cox under the decrees of the court were the duties of a special commissioner and not those of Clerk and Master proper. This we think was correct. It was not necessary that when the master was ordered to perform any duty which

did not properly pertain to the office of Clerk and Master, that he should be styled "special commissioner." It is enough that the Clerk and Master was ordered to perform the duties, and that the duties were not those pertaining to the office of Clerk and Master proper. This would make him, as to these duties, special commissioner or receiver. It was said by Judge Sneed, in the case of *State Ex Rel.* v. *Blakemore*, 7 Heis., 638, that the office of commissioner was attached to that of Clerk and Master by the act of 1852, although the liability on the bonds were kept separate.

The Chancellor also held that in all cases where money or property came to the hands of A. Cox by virtue of his official position otherwise than as commissioner or receiver, his sureties on his bond as Clerk and Master were liable. We are of opinion that this was also correct; see the case of 7 Heiskell, above referred to, and the case of *Waters* v. *Carroll*, 9 Yer., 102.

The decree of the Chancellor will be affirmed and the cause remanded, the appellants paying the costs of this court.

3L 524
5L 119
10L 473
12L 746
1pi 325
4pi 547

STATE *v.* H. M. STANLEY *et als.*

1. STATE TAX ON LITIGATION. *Must be paid first out of costs collected by the Clerk.* The claim of the State for taxes has precedence over a mere private debt, and if a clerk collects from the unsuccessful party a sum insufficient to pay all costs in a cause, but a sufficiency to pay the State tax, he should pay the State tax first, and officers and witnesses are not entitled to a *pro rata.*

2. SAME. *Officers and witnesses not required to refund. When.* If, however, the unsuccessful party should himself pay any officer or witness his own costs voluntarily, and as a payment of such specific costs, such officer or witness could not be required to refund such payment, that it might be applied to the payment of the State tax.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. W. S. MCLEMORE, J.

Z. W. EWING and JOHN FRIZZELL for the State.

JONES & STEELE for Stanley.

DEADERICK, C. J., delivered the opinion of the court.

This is a motion made by the State against Stanley and his sureties as Clerk of the Circuit Court of Giles county. Its object is to obtain judgment for the State tax collected by him in cases determined in the circuit court, and the questions submitted are:

1. Is the clerk liable for such tax when he has collected an amount insufficient to pay said tax and all the costs of the cause?

2. And where the amount collected is sufficient to

pay part only of the costs adjudged, should he pay first the State tax or the officers and witnesses, or should the payments to all be made *pro rata?*

3. If costs are specifically paid to officers or witnesses entitled to them, by parties, can they be compelled to refund such costs, that they may be paid in satisfaction of the State tax?

A plausible argument against the constitutionality of the tax upon litigation has been submitted, but this question has been fully considered and passed upon by this court, affirming the right, and is not now an open question in this State. By sec. 551 of the Code it is enacted, "The unsuccessful party in every litigation in the courts of record, and the party taxed with the costs in prosecutions by presentment or indictment shall pay to the State a specific tax on litigation." This tax is made out by the clerk in whose court judgment is rendered, with the bill of costs, and with the costs is collected by execution off of the unsuccessful party. And when thus collected off of the unsuccessful party to the litigation, the amount of the tax imposed by the State should be paid over as part of the State's revenue. But it was held in the case of the *State* v. *Nance* that the State was not entitled to this tax against the successful party, as by the express terms of the act the tax was imposed upon the unsuccessful party to the litigation. 1 Lea, 644. It is a tax, however, and not costs of the cause, although collected as or with the costs, as decided in that case. Being a tax legally imposed, when an amount sufficient for its payment is collected, the officer collecting

it is responsible for it, and it being essential to the existence of the government that the taxes due the State should be certainly and promptly realized, they constitute a lien upon the property assessed, and summary proceedings are allowed for their collection.

The claim of the state for taxes has precedence over a mere private debt of the citizen, and we are of opinion that if the officer collects and pays over to the clerk, from the unsuccessful party, a sum insufficient to pay all costs, that the State tax should be first paid, and not postponed until the officers and witnesses have been paid. If, however, the unsuccessful party should himself pay any officer or witness his own costs voluntarily, and as a payment of such specific costs, such officer or witness could not be required to refund such payment that it might be applied to the payment of the State tax.

The result is that the judgment of the circuit court is reversed, and judgment will be entered here against the clerk and his sureties in favor of the State for the amount of tax received by said clerk from unsuccessful parties, not paid by the party to witnesses or officers specifically upon their claims.

3L 527
6L 62

WILLIAMSON *v.* STEELE.

GROWING CROP. *Purchaser. Judgment Creditor.* An instrument which conveys so much of the grantor's growing crop of cotton as will be sufficient to make two bales of lint cotton, each weighing not less than 500 pounds, the same to be gathered, prepared for market, and delivered by the grantor to the grantee by the first of the succeeding December, passes no title to any of the cotton as against a judgment creditor of the grantor who levies his execution on seed cotton in a pen, part of the crop, before the first of December, and the mere intention of the grantor, not communicated to the grantee or the creditor before the levy, to gin, bale and deliver the particular cotton to the grantee, will not change the result.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. W. S. MCLEMORE, J.

W. H. MCCALLUM for Williamson.

JONES & STEELE for Steele.

COOPER, J., delivered the opinion of the court.

Action of replevin for two bales of cotton, brought by Williamson against the officer who had levied an execution in favor of Steele on the cotton. Steele was substituted as defendant in place of the officer. The case was tried by the judge, without a jury, who rendered judgment for the defendant, and the plaintiff appealed in error.

The cotton was raised by Hays and Puryear in 1879. On the 15th of November, 1879, the cotton

being then in a pen and unginned, it was levied on by a valid execution in favor of Steele against Hays and Puryear.

On the 17th of November, 1879, the writ of replevin was sued out. The plaintiff claims under a written instrument executed by Hayes and Puryear on the 4th of June, 1879, duly proved and registered on the 22d of July of that year. By this instrument the grantors say they "have this day bargained and sold and do hereby convey" to G. T. Williamson "so much of the cotton crop" now being raised on their farm, describing it, "as will be sufficient to make two bales of lint cotton, each weighing not less than five hundred pounds, the same to be gathered and prepared for market by us, and delivered to the said G. T. Williamson by the first day of December next." It is then recited that the conveyance is made in consideration that Williamson "has already and is in the future to furnish" the grantors with supplies to make the crop then growing, the supplies not to exceed seventy-five dollars. "Now, if we do not pay said Williamson for said supplies by the first of December, then said Williamson is to sell said cotton for the best price he can obtain, and out of the same pay first the expense of this trust, and next for said supplies, and the balance to us."

It was agreed by the parties that Hays and Puryear raised on the farm seven bales of cotton, five of which were prepared for market and sold by them without the knowledge of the plaintiff. There was left 3,220 pounds of seed cotton in a pen, being the

cotton levied on, and 300 pounds ungathered in the field. The seed cotton in the pen would about make two bales of 500 pounds each, and Hays and Puryear intended to have it ginned, made into two bales, and delivered to Williamson, but they did not communicate this design to Williamson, or inform Steele thereof until after the levy.

The owner of a growing crop may make a valid conveyance of it in mortgage, which, if registered, will be good against creditors. *Butler* v. *Hill*, 1 Baxter, 375. A similar conveyance of a definite part of the crop would, no doubt, be equally valid *pro tanto*. The difficulty in this case is that the instrument relied on does not convey any particular or aliquot part of the crop, as one-half, one-fourth, or the like, nor even a specific portion, in pounds or bales, so designated as to pass, by the terms used, at once to the grantee. *Thurman* v. *Jenkins*, 2 Baxter, 426. It conveys, it is true, so much of the cotton crop as will make two bales of lint cotton, each weighing not less than five hundred pounds, but does not so specify the part intended to be conveyed as to pass the title. The rule of law requires such a description, either general or special, of the property sought to be mortgaged, as will enable any one to take the deed, and from its face to designate the property described. *Overton* v. *Holinshade*, 5 Heis., 683. This may be done where a definite although undivided share is conveyed, for the grantee takes title to the extent of the interest in every part of the property. Nor would the rights of the grantee in such case be prejudiced by a

provision that the share was "to be gathered, prepared for market, and delivered" by the grantor to the grantee, for it would only amount to a stipulation for so much work on the crop, and the delivery would be of that to which the title had already passed. But where only a certain quantity of articles of the same character, such as cattle, grain in bulk, or a particular crop, is undertaken to be conveyed, no title can pass until the quantity is selected and set apart; until selection made, the whole property would be subject to execution by the grantor's creditors. For what is sold is not separated from that which is not sold, and the grantee has no title in any particular property for which he could bring an action. *Sugg* v. *Tillman*, 2 Swan, 208; *Farquharson* v. *McDonald*, 2 Heis., 404, 416. The grantee, under the deed before us, has no right to select any particular part of the cotton raised to the extent of the quantity necessary to make two bales, and assert title thereto as against the grantor's creditors acquiring liens on the crop. If he could do so as to the seed cotton levied on by the defendant, he could equally select his two bales from the five previously sold. His right would be ambulatory to suit his convenience or his caprice. The selection is left to the grantors by whom the prescribed quantity is to be "gathered, prepared for market, and delivered." It is the fact that no title passed, or could possibly pass, to any of the cotton until designated by the selection of the grantors, that gives the creditor the better right. The contract embodied in the instrument was legal, and a selection and setting apart

of the property for the grantee by the grantors, before levy, would have perfected the grantee's right in equity. *Langton* v. *Horton*, 1 Hare, 549; *Phelps* v. *Murray*, 2 Tenn. Ch., 750; *Grimes* v. *Rose*, 24 Mich., 416. The intention of the grantors to have the seed cotton, which was levied on, ginned, made into bales, and delivered, cannot supply to place of the act. The will is not equivalent to the deed, where the rights of third persons are concerned.

The judgment will be affirmed.

THE STATE for use of G. M. Meek *v.* R. A. ROSE *et als.*

1. ACTION ON SHERIFF'S BOND. *Failure to return execution. Attorney's instruction.* In an action on a sheriff's bond for a failure to return or make the money on executions issued upon a judgment recovered by the clerk of a court for the benefit of the litigants in a suit pending in the court, it is error to charge that the sheriff would not be liable at all if his default was occasioned by the instructions of the attorney of one of the parties litigant, beneficially interested in the fund in question.

2. SAME. *Same. Same. Semble:* Such a judgment is exclusively under the control of the clerk, and no attorney, except one recognized by him as entitled to act, unless indeed it be an attorney representing all the parties beneficially interested, can be allowed to interfere with the execution so as to protect the officer.

State *v.* Rose.

3. SAME. *Same. Same.* The question is reserved whether the defendants can in this suit, or in equity, claim exemption from liability, or protection to the extent of the interest in the fund of the litigants whose attorney did undertake to control the execution to the prejudice of the sheriff.

FROM LAWRENCE.

Appeal in error from the Circuit Court of Lawrence county. J. V. WRIGHT, Sp. J.

G. T. HUGHES for plaintiff.

ROSE & TINNON for defendants.

COOPER, J., delivered the opinion of the court.

Action against the defendants as the sureties of Jno. W. Stewart on his official bond as sheriff for his failure to make due and proper return of executions issued on a certain judgment, or to realize the money. The verdict and judgment were in favor of the defendants, and the plaintiff appealed in error.

The error relied on for reversal is in the charge of the court. On the 3d of December, 1860, a judgment was rendered by the county court, on motion, in favor of G. M. Meek, then clerk of the court, against C. H. Nicholson and others for $1,104.90, on a note given for property sold under a decree of the court in the case of *G. M. Simonton et als.* v. *Jas. M. Buchanan et als.*, and bought by Nicholson. The suit in which the sale was made was instituted by the adult distributees of Jane Simonton, deceased, against the infant distributees for a sale of slaves for division. The suit was commenced and prosecuted by the de-

fendant, R. A. Rose, as the solicitor of the plaintiffs. The executions, for the sheriff's default as to which this suit was brought, were issued on the 12th of December, 1860, the 13th of March, 1861, and the 21st of December, 1861. One of the pleas relied on in defense of the action was, that these executions were held up and returned at the special instance and request of the plaintiff. The bill of exceptions shows that proof was introduced tending to show that R. A. Rose, acting as an attorney having a right to control the judgment, had instructed the sheriff to hold up the executions. And on the execution of the 13th of March, 1861, there is this endorsement: "The within *fi. fa.* to be held up until further instruction, but the levy not to be released, or in any way disturbed by holding up the *fi. fa.* This May 5, 1861. R. A. Rose, attorney for plaintiff."

The court charged the jury that if they believed that R. A. Rose, as attorney for the plaintiff, Simonton, ordered that the executions be held up, and the sheriff, in accordance with said orders, held up the executions, then the sheriff and his sureties would not be liable. And the court refused the special request of the plaintiff to charge that any interference by any other person than G. M. Meek, the plaintiff in the judgment, or some person duly authorized by him, with the execution in the hands of the sheriff, by ordering it to be held up or otherwise, would be no excuse to the sheriff for a failure to discharge his duties under the execution, and consequently that it would not be a sufficient excuse for a part of the distribu-

tees, or their attorneys, to interfere with the execution.

The charge and refusal squarely raise the question whether the sheriff will be protected by the intermeddling or orders of the attorney of a part of the persons beneficially entitled to the proceeds of a judgment recovered by a clerk of the court for the benefit of litigants in a pending suit. The question seems to be an open one, the decisions heretofore made relating exclusively to judgment creditors having a joint right. It has been held that a sheriff ought not to be made liable for the non-return of an execution when his failure resulted from the instruction or intermeddling of the plaintiff. *Robinson* v. *Harrison*, 7 Hum., 189; *Granberry* v. *Crosby*, 7 Heis., 579. The same rule would, no doubt, apply to any other official delinquency touching an execution occasioned by the plaintiff. It seems to be settled, also, that one of several plaintiffs in a judgment, or one of several owners of the judgment, may bind his co-plaintiff or co-owners by a receipt of payment, release, or other act, and may, consequently, protect the sheriff by his acts or instructions. *Erwin* v. *Rutherford*, 1 Yer., 169; *Clingman* v. *Barnett*, 6 Hum., 20; Freem. on Ex., sec. 442. The reason is, as put by Judge Whyte in 1 Yer., that it is a general principle of the law that when two have a joint personal interest, the release of one bars the other. *Ruddock's case*, 6 Co., 25; *Pierson* v. *Hooker*, 3 Johns, 68. The principle has been applied to the receipt of payment and release of a mortgage by one of two mortgagees. *People* v. *Key-*

ser, 28 N. Y., 226, where the authorities on the subject are largely cited and considered. It is otherwise, however, where the mortgage is given to two persons to secure to each a separate demand. *Burnett* v. *Pratt*, 22 Pick., 556. In the case of *Erwin* v. *Rutherford ut supra*, it was held that the owners of a judgment are those who are beneficially interested, and therefore that one of two persons for whose use a suit was brought and judgment recovered, might receive payment of the judgment. The reason is, that the beneficial owner of a chose in action is so far recognized, both at law and in equity, that he alone is entitled to satisfaction from a debtor having knowledge of his right.

The question remains, do the persons interested in the proceeds of a judgment recovered by the clerk of a court for the benefit of the litigants in a suit pending in his court, have "a joint personal interest" in the judgment within the rule? Clearly they do not. Their interest is not joint, but several to the extent of their respective shares of the estate or fund in litigation, as it may have been or may be ascertained by the decrees in the cause. It will often happen that one or more of the litigants having an apparent interest may prove to have none, and if the rule applied such parties would have the same control over the judgment as those actually interested, for the officer cannot be expected to know his real interest. The clerk, moreover, is not a nominal party, but an active trustee, with positive duties, and bound to collect, receive and disburse under the orders of the

court. A payment to one litigant would be no protection to the officer. Nor is it seen how the duty to execute the process which is an entirety and the liability for a default can be split up into parcels at law. The only safe and practical rule would seem to be that the judgment is exclusively under the control of the clerk, and that no solicitor or attorney, except one recognized by him as entitled to control the process, unless indeed it be one representing all the parties beneficially interested, can be allowed to interfere with the executions so as to protect the officer. It is enough, however, in this case, to say that the court was in error in charging that the sheriff would not be liable at all if his default was occasioned by obeying the instructions of the attorney of one of the parties. No question is raised by the record whether the sureties can, in this suit or in equity, claim exemption from liability or protection to the extent of the interest in the fund of the litigant or litigants whose attorney did undertake to control the sheriff's action, nor is the question made whether the attorney who thus acted was so recognized by the clerk as to make his act binding on that officer.

The judgment must be reversed and the cause remanded.

C. N. ORDWAY *et als.* *v.* R. G. P. WHITE.

DEED OF TRUST. *Construction.* By a trust assignment of land, which authorized the assignee to sell for cash, and after paying expenses to apply the proceeds to the satisfaction of the debt secured, the grantor added: "And in the event a sale is made, I hereby waive the right of redemption given me by law, and in the event a sale is made the said grantee agrees, in consideration of the waiving of the right of redemption, to make the land bring as much as $4,000." Held, that the grantee was not bound to make the property bring that price unless he made the sale free from the equity of redemption.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

N. SMITHSON and J. S. WILKES for complainants.

T. M. JONES and W. H. MCCALLUM for defendants.

COOPER, J., delivered the opinion of the court.

On the 21st of March, 1873, R. Harris, one of the complainants, conveyed to the defendant, R. G. P. White, a house and lot in the town of Pulaski, to secure him from loss in certain cotton transactions in which they were jointly interested. The deed provides that as soon as the cotton has been sold and the deficiency ascertained, White may sell the said house and lot for cash, after advertising according to law, and apply the proceeds, after paying the expenses

of the trust, to the satisfaction of Harris's portion of the debt; "and in the event a sale of said house and lot is made, I hereby waive the right of redemption given me by law, and in the event a sale of the house is made the said White agrees, in consideration of the waiving of the right of redemption, to make it bring as much as four thousand dollars." The deficiency provided for was afterward ascertained to be $2,524, for which Harris executed a note to White, dated July 9, 1873, at one year, with ten per cent. interest, from date until paid. On the 19th of December, 1874, Harris conveyed the same house and lot to the complainants, Ordway, Gordon & McGuire, to secure an anticipated indebtedness to them on cotton transactions, afterward found to be $4,446. This conveyance recites the execution of the previous deed to White, and authorizes Ordway, Gordon & McGuire, in the event of loss in the cotton transactions, to close this mortgage by selling, in connection with R. G. P. White, said store-house and lot for cash to the highest bidder at the court house door in the town of Pulaski, after giving the usual notice required for the sale of land, free from the equity of redemption, and apply the proceeds of said sale, first, to the payment of the debt of R. G. P. White, and all interest thereon, and the expense of executing this mortgage; second, to the payment of whatever may due to Ordway, Gordon & McGuire.

On the 12th of June, 1875, White sold the house and lot at public sale, subject to redemption, having given notice in his advertisement that he waived the

right given him to sell free from the equity of redemption. On the 9th of the same month he undertook, by instrument of writing duly acknowledged and registered, to make the same waiver. At his sale the land was ostensibly bid off by a third person, but under an arrangement with White by which he was to take the land at the bid, $2,500. In the month of September following, White went through the form of redeeming the land from the purchaser upon his mortgage debt, and advanced $500 on the bid. He executed a deed to the purchaser who quit-claimed to him. Harris seems to have been verbally notified, three days before the sale, of the waiver of White, but he did not consent to it. Ordway, Gordon & McGuire had no notice of the waiver or sale.

Harris remained in possession of the property, receiving the rents and profits, until the 1st of August, 1877, when the tenant attorned to White, and White has continued in possession. Ordway, Gordon and McGuire received information, but not from White, three months before the time for redemption had run out, that the land had been sold subject to redemption, and they never offered to redeem. They never demanded a resale, nor offered to sell it under their deed. Harris has been discharged in bankruptcy, and his assignee has done nothing in regard to the property. This bill was filed on the 20th of August, 1877, by Ordway, Gordon, McGuire and Harris against White to have a construction of the two mortgages and a declaration of the rights of the parties. It asks that White be held to have taken the land at

his sale at the price of $4,000, as agreed upon by him in his mortgage; and if not, that he be declared to have forfeited all right to the property, and it be sold in satisfaction of the debt of Ordway, Gordon & McGuire. The defendant answered the bill and the cause was heard upon the pleadings, and an agreement of facts embodying the foregoing statements. The chancellor charged White with $4,000 as of the date of the sale, but refused to make him pay interest on the surplus over his debt from that time until the filing of the bill. Both parties appealed.

The property in controversy has depreciated in value since the date of the trust conveyance, and therefore the complainants are anxious to hold White bound as the purchaser at his sale, but at the price which, they insist, he agreed that the property should bring. Of course they have the right to avoid the sale, because White was virtually the purchaser at his own sale. They prefer to validate the sale, provided they can hold him liable as upon a bid of $4,000. It is very clear that this can only be done upon the ground of contract, for whatever right of action they might have for the breach of trust in selling in the mode adopted and to himself, the damages are not shown to be the difference between the bid and $4,000, or any other sum, nor are the pleadings and proof shaped to recover damages. And if the property was worth no more on the day of sale than White's debt, and has since depreciated, they have suffered no damage. To charge him with the sum mentioned, they must show a contract. If the stipulation of the deed to White

had been that in consideration of the conveyance of the land for his security, he agreed to make it bring as much as $4,000, the complainant's contention would be well founded. If, on the other hand, the stipulation had been explicit, that in consideration of the waiver of the equity of redemption, he would make it bring, upon a sale for cash free from the equity of redemption, the sum in question, it would be even more clear that he would not be bound for that sum unless he made the sale upon those terms. The whole difficulty grows out of the peculiar wording of the deed, by which the meaning of the parties is left in doubt. The instrument first provides that after the debt is ascertained White may sell for cash and apply the proceeds, after paying the expenses of the trust, to the satisfaction of the debt. If the deed had stopped here, the power would have been to sell for cash subject to redemption. It adds, however, that "in the event of sale" the grantor waives the right of redemption, and repeating the words "in the event of sale," etc., White agrees in consideration of the "waiving of the right of redemption," to make the property bring as much as $4,000. Now, if the complainants be right in their construction, that White was bound to make the property bring $4,000 at any sale he might make, it can only be by making the last clause abrogate the one that precedes, and forbid any sale except a sale free from the equity of redemption. It is possible that such was the intention of the parties, but they have not said so, nor does

the language used, looking to the whole instrument, naturally admit of that construction.

The grantor has first conferred the power of sale for cash, saying nothing about redemption. Then he adds, but I am willing to waive my equity of redemption, and the grantee says, in consideration thereof, "in the event a sale of the house is made" on these terms, I will make it bring as much as $4,000. This construction leaves every part of the instrument in full force, and explains the repetition of the words "in the event a sale of the house is made," in the last clause. They are pure surplusage, and a blot on the whole sentence, unless the draftsman intended to say, after the grantor had waived the right of redemption, "that in the event of a sale" free from redemption, White's agreement, in consideration thereof, was to take effect. White does not agree, in consideration of the conveyance, or in any event, to make the property bring so much, but only if the sale be made free from the equity of redemption, in consideration of the waiver. The power to sell subject to redemption first given was never intended to be taken away. This view is greatly strengthened by the terms of the second mortgage, which subordinates the rights of the grantees to those of White under his deed.

The complainants may elect to set the sale aside and have a resale, under the two deeds, free from redemption, for cash or upon time. The defendant will, in that event, be charged with the rent of the property since he has been in possession, less taxes and reasonable repairs, and be first paid his debt, with

interest, out of these rents and the proceeds of sale. If the complainants make this election, inasmuch as they had the opportunity to redeem the property at less than the first mortgage debt, they will pay all the costs incident to this election, if the property and rents fall short of paying defendant's debt, otherwise, such costs will be paid out of the fund. If the complainants elect to allow the original sale to stand, the title of the defendant will be validated by the decree. In either event the defendant will pay all the costs of the cause to this date.

Reverse the decree below, and enter a decree here in accordance with this opinion.

3L 543
7L 210
14L 576

F. M. Bunch *et als.* v. Jones M. Hardy *et als.*, AND Martin B. Wood *et als.* v. Robert L. Evans *et als.*

Will. *Construction.* Under a will written by an unlettered draftsman, by which the testator gives land equally to his sons and daughters as the specific objects of his bounty, and makes provisions which contemplate the keeping together of the property for the benefit of the sons and daughters and their children during the life of the sons and daughters, and even afterward, for the benefit of the wives of the sons, it was held that the legal title passes in trust for the benefit of the sons and daughters as long as the latter continue members of the family,

for the life of the sons and daughters, and after their death to their children, and that the title of the parents is not subject to execution sale.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

N. SMITHSON for complainants.

W. H. MCCALLUM for defendants.

COOPER, J., delivered the opinion of the court.

The rights of the parties to these two suits turn upon the construction of the will of Martin B. Wood, deceased, who died in September, 1865. At that time, as well as on the 13th of the preceding May, when the will was executed, the testator had four sons and four daughters living, a grandson, the son of a deceased son, and another grandson, the son of a deceased daughter. The living daughters were then married and had children, and neither daughter, it seems, has had a child since the testator's death. Three of the living sons were then married, two having children and the third one child, and all have since had other children born unto them. Nancy E. Hardy, one of the daughters, had six children, one of whom, Mary L., intermarried with complainant, F. M. Bunch, and another, Virginia, intermarried with complainant, David A. Gordon.

The first of these bills was filed by Bunch and wife and Gordon and wife, claiming that each of Nancy E. Hardy's children took, equally with their

mother, a share in the land devised to the mother under her father's will. The second bill is filed by the children of George A. Wood, one of the sons of the testator, claiming in like manner an equal interest in the land devised to their father, and seeking to enjoin Evans and Fry, as creditors of the father, from taking possession of the land under a purchase of the father's interest at execution sale.

"Being desirous," says the testator in his will, "to arrange and secure to all my children, after my death, an equitable and suitable division and securement of all my property and effects, do hereby ordain as follows." After providing for the payment of debts, and directing the terms on which his personal property is to be sold by his executor, the testator asks the county court to appoint five citizens, land owners, "to examine all my lands that I may die possessed of, and proceed to examine and divide the whole amount as near equal in value as possible in ten shares or parcels, numbering from one to ten, so that all my children, or their representatives hereafter named, shall share and share alike in value, as follows: Mary A. C. Rutledge, wife of Dr. J. B. Rutledge, deceased, and her children, shall have one share. Margaret K. Goff, wife of John Goff, and her children, shall have one share; Louisa T. Ham, wife of James Ham, and her children, shall have one share; my grandson, Robert Martin McCorister, son of Eliza McCorister, deceased, shall have one share; Nancy E. Hardy, wife of James M. Hardy, and her children, shall have one share; Robert G. Wood and his children shall have

one share; my grandson, Wallace R. Wood, son of John M. Wood, deceased, shall have one share; Geo. A. Wood and his children shall have one share; Thos. M. Wood and his children shall have one share, and David R. Wood shall have one share, being in all ten heirs."

The testator then makes provision for equalizing the shares of the devisees in the land by payment of money, and requiring them to account for advancements specified, "so far as for all to be equal in the division of lands, including the amount each one of the children has heretofore received from me." He adds: "My executor will, as soon as he collects and closes up the money means of said estate, pay it over equally to each legatee, or legally authorized representative, so as to secure the proper division equally of my entire estate. Furthermore, it is my will especially that Margaret K. Goff and her children shall receive and have sole control and title to all of their interest in my estate, free from the claims, management or control of her husband, John Goff; and that Louisa T. Ham and her children shall receive and have control and title to all their interest in my estate, free from the claim, management or control of her husband, James Ham; and that Nancy E. Hardy and her children shall receive and have sole control and title to all their interest in my estate, free from the claim, management or control of her husband, James M. Hardy; and that the county court appoint a suitable person to take charge of and control all the interest in my estate going to Robert G. Wood,

and appropriate the increase, or so much of it as may be necessary for the support of himself and family, and in the event of his death, his wife, Sarah A. Wood, shall have the right to remain on his land free of charge until the youngest child may become of age; and that Henrietta M. Wood, wife of John M. Wood, deceased, shall have the right to remain on the land I willed my grandson, Wallace R. Wood, her infant son, until he becomes of age, free of charge. In the event of the death of George A. Wood, his wife, E. A. Wood, shall have the right to live on his land, free of charge, until his youngest child becomes of age. In the event of the death of Thomas M. Wood, his wife, Mary Jane Wood, shall have the right to live on his land until his youngest child becomes of age." The will then mentions in detail the testator's land, and appoints an executor.

Parol evidence is admissible to apply, but not to explain the terms of a written instrument. *Snodgrass* v. *Ward*, 3 Hay., 40. The state of facts may, therefore, be proved under which a will was made, the situation of the testator's property, the members of his family, and such other facts as will enable the court to place itself as near as possible in the situation of the person whose language is to be interpreted. *Gannaway* v. *Tarpley*, 1 Col., 572. For this purpose the testimony showing the number of the testator's children and grandchildren at the date of executing the will, and at his death, and their condition in life, was competent, and the chancellor erred in excluding it. Whether the evidence touching the person by

whom the will was written, and his vocation, was properly admitted is immaterial. The will shows on its face the hand of an unskillful draftsman—not the work of a lawyer. Its meaning must be arrived at from its general scope, and by giving the words used their ordinary acceptation, rather than by technical rules.

Obviously, his eight living children and his two grandchildren, representing each a deceased child, are the main objects of the testator's bounty. He has, however, in every instance where one of his sons or daughters had, at the date of the will, a child or children, included such child or children in the devise to the parent. His language is, "Nancy E. Hardy and her children shall have one share, George A. Wood and his children shall have one share." The language, taken by itself, where there are children then in existence, has been generally held to give the property devised equally to the parent and children. *Gordon* v. *Weildon*, 11 Beav., 170; *Belote* v. *White*, 2 Head, 703; *Gannaway* v. *Tarpley*, 1 Col., 572; *De Witte* v. *De Witte*, 11 Sim., 41; so in the case of deeds, *Lillard* v. *Rucker*, 9 Yer., 64; *Barnes* v. *Vickers*, 3 Baxter, 370; *Arrington* v. *Roper*, 3 Tenn. Ch., 574. But even in such a gift by will a very slight indication of intention that the children should not take jointly with the mother, is sufficient to enable the court to decree a life estate to the mother, with remainder to her children. Per Lord Cottenham in *Crockett* v. *Crockett*, 2 Ph., 553, 556. The reason is, that children born after the death of the testator may

otherwise be cut off. *Jeffery* v. *DeVitre*, 24 Beav., 296; *Morse* v. *Morse*, 2 Sim., 485; *French* v. *French*, 11 Sim., 257. Such "indication of intention" has been found in the majority of cases in this State. *Harris* v. *Alderson*, 4 Sneed, 250; *Moore* v. *Simmons*, 2 Head, 546; *Turner* v. *Ivie*, 5 Heis., 222; *Hix* v. *Gosling*, 1 Lea, 568; *Squires* v. *Old*, 7 Hum., 454; *McCall* v. *McCall*, 1 Tenn. Ch., 504. In some of those cases the "indication of intention" was clear enough, and in others "very slight." Precisely what will be a sufficient indication, it may be difficult to define.

Undoubtedly, where the property is given to a parent for the maintenance of the parent and children, the intention is that the parent shall receive the income or profits, and maintain the children so long as they form a part of the family; and when the children are forisfamiliated, as by departure from the parental roof, they lose the right to maintenance. 2 Spence Eq., 461; *Harris* v. *Alderson*, 4 Sneed, 256. In the case just cited, the fact that the will, in the first instance, gave the testator's daughter a specific share of the estate, and made it subject to a trust for the "daughter and her children" only by a subsequent clause, was held sufficient to take the devise out of the rule. The same circumstance controlled the decision in *Moore* v. *Simmons*, 2 Head, 546, while the learned judge who delivers the opinion also lays stress upon the point that if any interest passed to the children it must be a present one, and as such, might be demanded by a guardian, or by any child

on coming of age or marrying, with an account, perhaps, thus defeating the prominent object of keeping the property together for the support of the family as a unit. In both of these cases, however, as well as in *Turner* v. *Ivie*, 5 Heis., 222, the general intent, as gathered from the whole will, was taken into consideration.

In the will before us, the testator starts out with saying that "having been prospered and blessed by a kind Providence with a family of children and worldly means and property of value," he wishes to secure to "all my children" an equitable division, and directs a division of his lands into ten shares, as nearly equal in value as possible, "so that all my children or their representatives hereafter named" shall share and share alike. The children are afterward named, and the two grandchildren, the representatives of their parents, showing definitely to whom this clause refers. So when he comes to speak of the division of the surplus personalty, he directs it to be paid equally "to each legatee or legally authorized representative." These provisions of the will leave no doubt that the testator's children, and his two grandchildren as representing their parents, were the primary objects of his bounty.

The children of the living sons and daughters are not mentioned in these clauses. They are only connected with their parents in the specification of the shares into which the land is to be divided. The exclusion of the marital right in the case of the daughters and their children, contemplates a separate

estate in the daughters of the entire share devised to each daughter. There is a provision for the wives of the testator's sons, if they survive their husbands, that they shall have a right to remain on the land allotted to the husband until the youngest child comes of age, which seems to contemplate the ownership of the entire lands by the children upon the death of the father, a result not attainable except by giving to the parent only a life estate.

And lastly, the inartificial manner in which the whole will is drafted does not allow us to give the words on which the claim of the children rests for a present division their technical sense. The general scope of the will, with the situation and pecuniary condition of the sons-in-law, and the modest share of land allotted to each child, lead to the conclusion, as strongly as in any of the cases cited, that the intention of the testator was to give his daughter, Nancy E. Hardy, and his son, George A. Wood, the only two shares now in controversy, a life estate in the land devised to each, subject to a trust for the maintenance of their children while members of the family, with remainder to their children respectively living at the death of the testator, or born during the continuance of the life estate. Land thus held by the parent, so long as the trust continues active, that is, while there are children members of the family, cannot be reached by execution at law, the legal title being in the parent as trustee, and his interest only equitable. The result would be the same if the legal title be in the parent and children subject to the trust.

Markham v. *Guerrent*, 4 Leigh, 279; *Hill* v. *McRea*, 37 Ala., 175; *Johnson* v. *Hurley*, 3 Tenn. Ch., 258; *Porter* v. *Greer*, 1 Col., 564.

There is no error in the Chancellor's decrees, and they will be affirmed with costs.

3L 552
4L 177
16L 148
1pi 523

JOHN HALL *et als.* *v.* THE STATE.

1. CRIMINAL LAW. *Special term of the court. Offenders may be indicted and tried.* Under the provisions of the Code which authorize the appointment of a special term "whenever it is necessary for the dispatch of business," and direct "that all business of every nature and kind shall be conducted as at the regular term," offenders may be indicted and tried at a special term of a criminal court.

2. SAME. *Arson.* The provisions of the Code in relation to arson and house-burning were not repealed by the act of 1865, ch. 5, sec. 4, which only increased the penalties for the offense of burning a dwelling house, and certainly had no effect on those provisions of the Code which related to the burning of any other building than a dwelling house, as for example a store house.

3. SAME. *Indictment. General Verdict.* Under an indictment containing two counts, one for burning a certain house, to-wit, a store house, under the Code, sec. 4666, and the other, under sec. 4668, for burning a valuable building, to-wit, a store house, a general verdict assessing a punishment within both sections will be good, although the minimum punishment, by confinement in the penitentiary under one section may be greater by three years than the minimum punishment under the other.

4. SAME. *Evidence. Conspiracy.* Under an indictment for the burning of a house, evidence is admissible of the organization of a company

to rob and burn houses generally, if the particular act were done by that company in pursuance of the general design, although the selection of the house was made afterwards.

5. SAME. *Same. Accomplice. Corroboration.* Evidence is admissible of facts tending to corroborate the testimony of an accomplice, although not otherwise directly bearing on the main fact tried.

FROM RUTHERFORD.

Appeal in error from the Criminal Court of Rutherford county. J. M. QUARLES, J.

C. A. SHEAFE and J. W. CHILDRESS for Hall *et als.*

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The plaintiffs in error, seven negroes and one white man, were indicted and convicted for arson. The white man and five of the negroes prayed an appeal in error to this court, which was granted, after their motions for a new trial, and in arrest of judgment were overruled. The other two negroes, John Hall and Burrell Smith, have brought the case before us by writ of error. They have, however, been sentenced to death by this court upon another indictment for murder, and this case, as to them, will not now be disposed of.

The indictment was found, and the defendants tried at a special term of the Criminal Court of Rutherford county, appointed by the judge of that court in vacation, as prescribed by the Code, section 3941. It is argued on behalf of the appellants, that the trial of new cases could not be had at that time. In support

of this position, counsel cite *Brown* v. *Newby*, 6 Yer., 395. But that case merely holds that, under the act of 1827, ch. 79, sec. 4, the court had power to appoint a special term to do any and every description of business on the docket, and that an appointment "for the trial of the causes on the civil docket," would include chancery as well as law cases. The act of 1827 gave power to appoint a special term for the trial of all cases "upon the docket." The argument is that the causes to be tried could only be those "upon the docket" at the time of the appointment of the special term, and that the like construction should be given to the section of the Code based on the statute. The construction put upon the language of the original statute is, perhaps, too narrow. No doubt the main object for authorizing special terms, was to relieve the dockets from the business then on them, but it would not follow that after the term was appointed, any business properly on the docket during the term, might not be disposed of, all other questions out of the way. And the Code, as if to remove all doubt, authorizes the appointment of a special term "whenever it is necessary for the dispatch of business," and directs that "all the business of every nature and kind shall be conducted as at the regular term." Code, sections 3940, 3945. No objection to the trial of the cause on this ground was made in the court below. Two of the defendants, McFerrin and Butler, applied for a continuance on affidavits filed, but these affidavits are not in the record, nor is any error assigned in the action of the court on them.

Hall *v.* State.

The indictment contains two counts; the first count is for willfully, maliciously and feloniously burning "a certain house, to-wit, a store house of the value," etc. The second count is for similarly burning "a certain valuable building, to-wit, a store house, etc. The first count is based on the Code, section 4666, and the second on the Code, section 4668. It is objected that these sections of the Code were, by implication, repealed by the act of the 17th of May, 1865, ch. 5, and, although the latter act was expressly repealed by the act of 1877, ch. 84, sec. 1, that the provisions of the Code were not revivcd, because their "title or substance" was not recited in the caption or otherwise of the act of 1877, which, it is insisted, is necessary to revive the previous law under the Constitution of 1870, art. 2, sec. 17.

The Code, section 4666 is: "Any person who willfully and maliciously burns the house or out-house of another, is guilty of arson, and shall be punished by confinement in the penitentiary not less than five nor more than twenty-one years."

Section 4668: "Every person who shall willfully and maliciously burn or set fire to any house, barn, stable, or other valuable building, or any building containing valuable property therein, or any stack or shocks of grain, fodder, straw or hay, or any valuable bridge, boat, or other water craft, shall be imprisoned in the penitentiary not less than two nor more than twenty-one years."

The act of 1865, ch. 5, sec. 4 is: "Any person duly convicted of house or bridge burning, shall suffer

death by hanging; provided, the jury, if they think proper, may commute the punishment to imprisonment in the penitentiary for a period of not less than ten nor more than twenty-one years. And provided further, that nothing in this act shall be so construed as repealing the laws now in force for the punishing of the offenses mentioned in this act; but all persons who have heretofore committed any of the offenses mentioned in this act, shall be tried under the existing laws, and, if convicted, shall be punished as now prescribed by law."

The act, it will be seen, does not in terms repeal any pre-existing acts. On the contrary, it says that nothing in it shall be construed "as repealing the laws now in force for the punishing of the offenses mentioned." It is true, this language, when construed in connection with what immediately follows, might be held to mean that the laws then in force were not to be considered as repealed, so far as offenses previously committed were concerned. But the whole act of 1865 was of a peculiar character, manifestly intended to meet the state of demoralization touching the rights of property existing at the close of the war, and to be temporary, not permanent. By its first, second and third sections it prescribes the punishment of death, with the like power in the jury to commute to confinement in the penitentiary for an increased term of years, for the crimes of stealing a horse, mule or ass, of breaking open the "house of another," and robbing or stealing from the person. The object of the proviso at the end of the fourth section seems to have been to prevent

the repeal by implication of the existing laws on these subjects, and to show that the act itself was designed to add additional punishment for the offenses.

The act was really *in terrorem*, to restrain the license of the hour, leaving the administrators of the law the option of proceeding under it, or under the previous statutes. Repeals by implication are never allowed, unless the latter and the former acts cannot possibly stand together. *Cate* v. *State*, 3 Sneed, 120; *Smith* v. *Hickman*, Cooke, 330. And the general rule is, that subsequent statutes which add cumulative penalties, or institute new modes of proceeding, do not repeal former penalties or methods of proceeding, without negative words, *Bennett* v. *State*, 2 Yer., 472; so held, where the defendant had been indicted under the existing law for an offense the punishment of which was a fine, and claimed that a subsequent act, which punished the same offense by imprisonment, pillory and infamy, repealed the previous penalties. And in that case there was no such proviso as is found in the act of 1865.

The act of 1865 increases the punishment for "house and bridge burning," and also for breaking open "the house of another." The latter words came before this court for construction in *Palmer* v. *State*, 7 Col., 82, and were held, in view of the highly penal character of the act, to embrace only a mansion or dwelling house. This construction was followed in *Mathis* v. *State*, 3 Heis., 127. In this view, and for the same reason, the "house burning" of the fourth section would be limited to the mansion house, leaving the

pre-existing law in full force as to every other class of houses. The provisions of the Code, so far as they are applicable to a "store house," the character of building described in the indictment before us, have never been interfered with. The argument relied on rests upon the assumption that the sections of the Code, under which this indictment was found, were repealed *in toto*, and necessarily fails in the view we have taken.

In this view, too, it becomes unnecessary to consider whether a statute which has been repealed, will be revived by a repeal of the repealing act, without being recited by its title or substance in the caption or otherwise of the last repealing act, under the provision of the Constitution of 1870, art. 2, sec. 17.

The first count of this indictment is framed under the Code, section 4666, for burning "a certain house, to-wit, a store house," etc. The second count is under the Code, section 4668, for burning "a certain valuable building, to-wit, a store house," etc. The punishment under the first of these sections is confinement in the penitentiary for not less than five nor more than twenty-one years; under the second, for not less than two nor more than twenty-one years. No motion was made to quash the indictment, nor to compel the attorney general to elect upon which count he would proceed. The joinder of several distinct felonies of the same degree constitutes no ground of demurrer or arrest of judgment, and of course cannot be asigned as error in a revising court. *Wright* v. *State*, 4 Hum., 194. Separate offenses, punished by differ-

ent degrees of severity, but differing only in degree and belonging to the same class of crimes, may be united, and often must be to attain the ends of justice; as for example, the offenses of stealing and receiving stolen goods. *Hampton* v. *State*, 8 Hum., 69; *Cash* v. *State*, 10 Hum., 111; *Ayres* v. *State*, 5 Col., 26. *A fortiori*, where the two counts in the indictment are obviously for the same offense. *Wright* v. *State*, 4 Hum., 194. In this case, the offenses charged are of the same class of crimes, scarcely differing in degree, and only slightly in punishment. The face of the indictment, as well as the proof, shows that each count is for burning the same store house. It may well fall under either section of the Code, and the general verdict is undoubtedly good. Code, section 5217.

Objection is made to the action of the court below in refusing to exclude certain testimony. The principal witness is a confessed accomplice, who testified that he and the prisoners had in December previous to the burning, which occurred on the last night in February, organized themselves into a company to rob and burn houses, described the form of swearing in, and stated their agreement to help each other, if caught, by money or fire. The same witness testifies that the agreement to burn the particular house was only entered into on the night of the fire. The objection to the evidence of the organization of the company and what then passed is, that they are not sufficiently connected with the act for which the parties were indicted. The witness himself says that the burning was in the pursuance of the original agreement. What he means is,

that the conspiracy was to rob and burn generally, and that any subsequent burning would be in pursuance of the agreement, although the particular building was not then fixed upon. If there was such a conspiracy, and of this the jury were to judge, the evidence was clearly admissible as explaining the concert of action of the defendants.

Objection is made to the refusal of the court to exclude the statement of a witness, that he slept on the night of the fire in a room in the second story of the building adjoining the store house which was burned. But the statement was merely explanatory of the important fact deposed to by the witness, and could not possibly have prejudiced the defendants. The material fact deposed to by him was, that he had thrown water from his window about the time the accomplice and the prisoners were engaged in their scheme of robbing and burning, according to the testimony of the accomplice, who also proved that they had been interrupted and startled by the throwing out of water from an upper window of the block of buildings. The evidence was competent and very important.

Objection is also taken to the testimony of two witnesses who depose to seeing some of the prisoners together, and having conversations with them, after the fire. But the evidence was competent, for what it might be worth, to show the association of the parties, and thereby corroborate the accomplice.

The judge charged, as requested by the defendants, that when several persons are jointly indicted, and

the accomplice is corroborated as to some of them, although the jury may give credit to him as to those to whom the corroboration applies, they should not credit the evidence of the accomplice as to those against whom there was no corroboration, if there was no proof, positive or circumstantial, to satisfy the jury of the guilt of the latter, except the testimony of the accomplice. There is nothing in this charge, or in the ruling of the court upon the testimony, either in admitting or excluding it, to which any of the defendants can except. The evidence of the accomplice is clear and explicit as to the actual commission of the crime for which the parties were indicted, and the participation of all of the defendants in the act. He undertakes to state the position of the several participants and what they did. The back door of the store house mentioned in the indictment was bored through in two or three places by an auger, with a view to breaking into the store, but the auger came in contact with an iron safe pushed against the door. The parties thereupon set fire to the door, which was found charred for several feet on the next morning. The accomplice is corroborated as to the defendants, John Hall and Burrell Smith, by the finding of the auger at their house, where they were living together, the auger being of an unusual size, and fitting the holes in the door. He is also corroborated as to these defendants and the white defendant, Hicks Slaughter, by the testimony of several witnesses, who depose to seeing them frequently together, and one of them to a conversation with Burrell Smith and Slaughter, in

which they urged him to join their band. As to those three defendants, Hall, Smith and Slaughter, the accomplice is corroborated, and we see no reason for disturbing the verdict as to Slaughter, the case as to the defendants Hall and Smith not being now before us.

There are only two witnesses whose testimony can be said to corroborate the evidence of the accomplice as to the other defendants; one of these testifies that Burrell Smith invited him to join their society, and meet him in front of a certain store in Murfreesboro that night, about seven or eight o'clock. Witness met him as requested, the defendant Slaughter being with Smith, and they suggested inducements why he should join them, among other things saying that he would thereby get plenty of money. While they were talking, the other witness passed by, and Slaughter said hold, that rascal will tell. The conversation was interrupted by the blowing of a whistle towards the depot, which Slaughter answered, and he and Smith went towards the sound. Not long afterwards, on the same night, witness went over towards the depot, and saw defendants Slaughter, Hall, Smith and McAdoo, with two men he did not know. He did not, he says, see the defendant Halbert with them that night. This witness had started out with saying that he knew all of the defendants except Butler. And after deposing to the conversation with Smith and Slaughter, he adds: "The two Bailey boys (who are not defendants) were with them sometimes. Several times when I came from church, I saw them all together late at night.

There were two of them I did not know. I don't know Butler and McFerrin (defendants). Saw Halbert (defendant) but once, when I met them near Mrs. Garrett's in town. Hicks Slaughter was with them all the time. I saw Bill Smith (the accomplice) with them. They were sometimes in crowds. I met them once at the foot of Main street. Hicks, Slaughter, Burrell Smith and Bill Smith asked me to join."

All that the witness deposed to occurred after the fire on which the indictment is found, and the principal conversation on the very next night thereafter.

The testimony of the other corroborating witness, so far as it bears on the defendants other than Slaughter, Hall aud Smith, is in these words: "Know all the prisoners except Joe Butler and Henry McFerrin. I saw Burrell Smith and Jack Monroe (the preceding witness), talking on the street in front of Smith's store. Slaughter was sitting on steps about thirty yards off. When I passed, Burrell Smith and Jack Monroe were talking, and Burrell Smith said, don't say anything where that fellow is. I passed on by. Ed. Lytle (defendant), was standing there near the hotel corner, talking with some boys, none of whom I remember, except Ed. Lytle. When I passed back the third time, there was a whistle blown and all moved off towards it. Burrell went towards Slaughter. The whistle was out towards the depot, and the second one was answered by some one near me, and then they were gone." This witness only identifies the defendant Ed. Lytle as with some boys, who moved off with Smith and Slaughter at the sound of the

whistle. The other witness testifies to no one as present at the time of his interview when the whistle blew, except Smith and Slaughter. Says defendant Halbert was not there, and that he never saw him with them except once. He did not know the defendants Butler and McFerrin, and does not say he ever saw either of them with the other parties. Says he saw defendant McAdoo with Slaughter, Hall and Smith near the depot. When he says he several times saw "them" all together at night, he specifies to no particular person. He has just been speaking of the "two Bailey boys," who are not defendants, and may mean that they were with Smith, Hall and Slaughter He could not refer to Butler and McFerrin, for he did not know them, and no where identifies them. There is no corroborative evidence as to these two defendants at all. Halbert seems to have been seen in the company only once on the public street. Ed. Lytle and Ed. McAdoo once at night, at separate hours the same night. This is too weak to send men to the penitentiary for twenty years.

In addition, the proof is that McFerrin lives near the town of Woodbury, about nineteen miles from Murfreesboro, and two witnesses swear positively to being with him at Woodbury until a late hour on the night of the fire, giving specific reasons why they remember the night. Several witnesses also depose to the regularity of habits of McAdoo in remaining at home at night during the period spoken of by the witnesses.

The judgment will be affirmed as to Hicks Slaughter, and reversed as to the other defendants now before us, who will be remanded for a new trial. The case is suspended for the present as to John Hall and Burrell Smith on their writ of error.

3L 565
11L 566

STATE OF TENNESSEE *v.* E. D. STALEY.

1. CRIMINAL LAW. *Grand Jury. Inquisitorial Powers. Institutions of Learning.* The Grand Jury have inquisitorial powers in case of selling liquor within four miles of an incorporated institution of learning.

2. SAME. *Technichalities.* The day for escaping the consequencies of crime on mere technicalities, not going to the protection of essential right, has gone by, and violators of law had as well accept the fact and act accordingly

FROM PUTNAM.

Appeal from the Circuit Court of Putnam county. R. CANTRELL, J., sitting by interchange with Judge McConnell.

ATTORNEY-GENERAL LEA for the State.

C. MARCHBANKS for Staley.

FREEMAN, J., delivered the opinion of the court.

This is a presentment by the grand jury, found on information of a witness sent before the grand jury under the inquisitorial power of the grand jury. It is for selling liquor, or tippling, within four miles of an incorporated institution of learning, the language being, "did unlawfully sell and tipple intoxicating beverages, to-wit, whiskey and brandy, within four miles of an incorporated institution of learning, contrary to the form of the statute in such cases," etc.

Several objections were made in the motion to quash, which was sustained by the court below. First, that the name of the institution of learning is not stated. We have ruled this not to be a valid objection in the case of *Odam* v. *The State*, 2 Lea, 220. Because the exceptions in the statute are not negatived. This is not necessary in this case, the exceptions not being in the enacting clause. Next, because of the exercise of the inquisitorial power of the grand jury.

The offense defined by the statute is, "selling or tippling" intoxicating liquors. By section 5087, and sub-sections, the grand jury have inquisitorial power whenever they or any of them suspect a violation of the laws against "gaming, illegal voting, tippling, disturbing public worship," etc.

This being a case of tippling, is clearly included under this statute. In enacting a new case of tippling and inflicting penalties for it, there was no need that the Legislature should expressly add that inquisitorial power was given to the grand jury. The law

had already given it in all such cases, and this was included as soon as the offense of tippling defined in the statute was established.

The next objection is, that the person to whom the liquor was sold is not named. This objection we hold untenable, following several cases heretofore decided by this court. Such as sale of liquor on Sunday.

The principle is, that it is selling at all within four miles of such an institution that is the essence of the offense, and not the person to whom sold. Any party can readily avoid liability to the penalties of the statute by abstaining from selling within the prohibited distance, and if he fails do so he ought to suffer for his wrong. The day for escaping the consequences of crime on mere technicalities, not going to the protection of essential right, has gone by, and violators of law had as well accept the fact and act accordingly.

The judgment quashing the presentment is reversed, and cause remanded to be proceeded in.

3L 566
9L 676
10L 133
10L 289

JAMES T. AMIS *et qls.* *v.* LEWIS T. MARKS *et als.*

1. EVIDENCE. *Lost or destroyed instrument. Copy prima facie evidence. When.* In a suit upon a constable's bond against the sureties, a copy of the bond, certified by the clerk of the county court, by his deputy, to be a true and correct copy, as it appears of record and on file in his office, and produced by the clerk of the circuit court from a file of papers in his office, in a suit against the same sureties, in which a final judgment had been pronounced, is *prima facie* evidence of the bond, and that it was duly executed, acknowledged and recorded by the county court, it having been first shown that the records and papers of that court for the year in which the bond was given, and for several years immediately preceding and following, were lost or destroyed, and the defendants admitting by their pleadings that they did sign the bond.

2. CONSTABLE'S BOND. *Securities bound, though not acknowledged in open court.* A constable's bond is good, although not acknowledged by the obligors in open court, and if delivered, accepted, recorded and filed, the proof necessary to avoid it as an escrow must be as clear, satisfactory and demonstrative as that required to set aside a decree or judgment of a court of record on the ground of fraud.

3. SAME. *Agreement between principal and sureties will not affect rights of public.* A private agreement between the surety and principal of an official bond in the nature of a condition, will not affect the rights of the public, when the bond has been accepted by the proper authority without notice of the condition, especially if there be nothing on the face of the bond to excite suspicion.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

W. H. MCCALLUM for complainants.

T. M. JONES for defendants.

COOPER, J., delivered the opinion of the court.

This bill is filed to hold the defendants liable as sureties on the official bond of William T. Marks, as constable of Giles county, the bond itself, together with the records of the county court for the year when given having been destroyed. William T. Marks died insolvent, and there has been no administration on his estate. He was elected constable in 1858 and again in 1860. The only controversy is in relation to the liability of the defendants, Lewis B. Marks and Samuel S. Williamson, on the bond of 1860. The Chancellor rendered a decree in favor of the defendants, and the complainants appealed.

The records and papers of the county court for the year 1860 and several years before and afterwards, are proven to have been destroyed. The complainants have introduced, as the next best evidence, a certified copy of a regular constable's bond, purporting in the body thereof to be the bond of William T. Marks as constable, and Samuel S. Williamson and Lewis B. Marks as sureties, in the penalty of $8,000, conditioned as required by law. Opposite the names of the obligors are written the words, "Test, E. W. Rose, chairman," etc., and Rose is proven to have been chairman of the county court when the bond purports to have been executed, namely, on the 2d day of April, 1860. The certificate to the copy of this bond is in the handwriting of the deputy clerk of the county court at the time it bears date, the 4th of April, 1861, and is authenticated by the signatures of the clerk by his

deputy. The certificate is, that "the within is a true copy of William T. Marks' bond as constable of said county, as the same appears of record and on file in my office." This certified copy is proved by the clerk of the circuit court to be on file in his office in a suit against these defendants, in which a final judgment had been pronounced.

The defendants, Samuel S. Williamson and Lewis B. Marks, in their answer to the present bill, admit that William T. Marks, either in 1858 or 1860, applied to them to become his sureties on his official bond as constable, and they did sign a bond as such. The proof is, that William T. Marks did enter upon and discharge the duties of constable in the year 1860, and afterwards continue to perform them, upon the faith of having qualified and given bond as required by law. Under these circumstances, if there were nothing else in the case, the duly certified copy of an official bond executed by the parties, would be *prima facie* evidence that the original bond, of which it purports to be the copy, was duly executed, acknowledged and received by the county court. The defendants say, however, that they never did acknowledge the bond before the county court, and they undertake to give their testimony to this effect, although one of them, Lewis B. Marks, says that he was giving his own bond as county trustee at the time, "and Squire Rose might have passed the bond to me and I might have signed it." Squire Rose, it will be remembered, marks his name opposite to the signatures of the obligors. If it be conceded that the

bond was not acknowledged in open court, it has been held both before and since the Code, that the bond would be good without the acknowledgment. *Goodrum* v. *Carroll*, 2 Hum., 490; *McLean* v. *State*, 8 Heis., 242; Code, section 773.

The defendants set up the defense that they signed the bond upon the understanding that it was to be signed by certain other persons named, before it was to be delivered to the county court. Their own testimony is the only evidence offered to sustain the defense, and each deposes to a separate conversation with their principal, W. T. Marks, when he applied to them for their signatures. Neither of them pretends that he had any conversation on the subject with any member or officer of the county court, or that any conversation on the subject took place in the hearing of the court, or any of its officers or members. Lewis B. Marks, who says that Squire Rose may have passed the bond to him and he may have signed it, testifies that he signed with the expectation that certain other persons named were to be called up to acknowledge the bond. He is then asked by his own counsel whether it was the distinct agreement that the bond was not to be delivered, or to become binding, until all of the parties named had signed and acknowledged. His answer is: "That was my calculation; there was no special agreement between us."

Williamson says, that W. T. Marks came to his house and asked him to go on the bond, and mentioned the names of certain persons who were going on it, when he, witness, said he would not object to be-

ing one of his sureties with them. On the next day Marks brought him the bond for his signature, when he noticed the name of Lewis B. Marks "upon the bond," by which he must mean, in the body of the bond with his own name, for the name of witness is signed at the foot of the bond before that of Lewis B. Marks. The bond was, therefore, at the time the witness put his signature to it, in the shape in which it now appears in the certified copy, with only two names in the body of it in addition to the name of the principal, being the names of the only two persons who actually executed it as sureties. Both of these witnesses say they knew William T. Marks was acting as constable afterwards, and yet neither ever made an enquiry about the bond.

Upon this testimony, and it is the only evidence in support of the defense, there is not the least pretence for holding that there was any such "special agreement," if such agreement can be made between the principal and surety alone, as would make out a valid defense, so far as Lewis B. Marks is concerned. And although Williamson's testimony is more direct as to an actual agreement, it can scarcely be contended that he, upon his own unsupported testimony, can be allowed to relieve himself from responsibility under the circumstances. It leaves it doubtful whether the promise of the principal was not rather by way of inducement, than by way of condition upon which alone the instrument was to be delivered, for the witness says nothing about delivery. *Evans* v. *Gibbs*, 6 Hum., 406; *Carrick* v. *French*, 7 Hum., 459.

The bond, whether acknowledged or not in open court, was *prima facie* delivered, accepted, recorded and filed. The proof necessary to avoid it as an escrow, if it can be so avoided, must be as clear, satisfactory and demonstrative as that required to set aside a decree or judgment of a court of record upon the ground of fraud. *Ward* v. *Oullom*, 2 Col., 353. If this can be done at all upon the unsupported testimony of the party who is sought to be charged, that testimony must be clear, explicit and demonstrative, to a positive certainty. If the law were otherwise, the people would have scant security under our system of official obligations.

The rule as to private obligations between parties under seal was, that an instrument might be delivered to the principal obligor upon condition that he procure another signature. *Perry* v. *Patterson*, 5 Hum., 132. But even in such case, and certainly since the abolishment of seals, ignorance of the condition where there was nothing on the face of the instrument to give notice, would protect a *bona fide* purchaser for value. *Merritt* v. *Duncan*, 7 Heis., 156; *State* v. *Potter*, 4 Cent. L. J., 85. Beore the Code, it was held by this court in one case, that the condition might be made by the surety with the officer of the county court whose duty it was to take the bond, and this, too, in the face of the record to the contrary. *Quarles* v. *Governor*, 10 Hum., 122. There are other decisions not in accord and which, perhaps, announce the safer and better rule. *Bryan* v. *Glass*, 2 Hum., 390; *Governor* v. *Organ*, 5 Hum., 161; *Ezell* v. *Justices*,

3 Head, 587. But the court has never held that a private agreement between the principal and surety, in the nature of a condition, would affect the rights of the public in an official bond delivered and accepted without notice of the condition, and especially, where there was nothing on the face to give notice. The public, who are compelled to trust the officer on the faith of his bond, are in the highest sense *bona fide* purchasers for value and without notice. And the provisions of the Code are based on this view. Code, sections 773, 774, 775.

The petition for re-hearing must be dismissed, and the judgment reversing the decree of the Chancellor, heretofore entered upon an opinion delivered by Judge Turney, must stand.

WESTLEY PATTERSON *v.* THE STATE.

CRIMINAL LAW. *Brass Knucks.* Brass knucks is used in the Statute as the name of a weapon, without reference to the metal of which it is made.

FROM HUMPHREYS.

Plaintiff in error was indicted in the Circuit Court of Humphreys county for unlawfully carrying brass knucks. The proof showed that the knucks were not brass, but were made of lead or pewter. He was convicted and appealed. Jo. C. STARK, J.

T. L. LANIER for Patterson.

JOHN FRIZZELL for the State.

TURNEY, J., delivered the opinion of the court.

The charge of the Circuit Judge is correct. The term "Brass Knucks," as used in the statute, embraces all weapons made after the manner of that described in the record. It is called "Brass Knucks" because originally (as is now frequently done), they were made of brass. "Brass Knucks" is used as the name of the weapon, without reference to the metal of which that weapon is made. It is the weapon and not the metal which is condemned by the law.

Affirm the judgment.

3L 576
7L 737
10L 317
14L 641

McEwen & Tompkins *v.* Bamberger, Bloom & Co. *et als.*

Creditors. *Lien by assignment and by legal proceedings. Priority.* In a contest between creditors claiming under a direct assignment to them by the debtor, and other creditors who had acquired a lien on the property by legal proceedings, the latter will have the better right, where, although the deed of assignment was registered, the assignee creditors had no notice of its existence until four years after the registration, and two years after the other creditors had acquired their lien, and then accidentally by finding the assignment on the register's book.

FROM MAURY.

Appeal from the Chancery Court at Columbia. J. V. Wright, Sp. Ch.

W. S. Rainey for complainants.

McDowell & Webster for defendants.

Cooper, J., delivered the opinion of the court.

Miles H. Mayes, being the owner of two store-houses on which there was a vendor's lien for unpaid purchase money, due by instalments on the 8th of June, 1867, 1868 and 1869, drew up and signed, on the 16th of November, 1865, a deed conveying the store-houses and lots on which they were situated to the complainants, McEwen and Tompkins, in trust, to secure to each of them a specific debt mentioned.

The deed provided that if the debts were not paid

by the time the last instalment of purchase money was satisfied, then the secured creditors might take possession and sell the land to pay their debts, and reserved to the grantor the right to remain in possession until the expiration of the time specified. This deed was registered on the 29th of November, 1865, upon the acknowledgment of the grantor. One of the grantees was a resident of another county in this State than the county in which the grantor resided and the land lay, and the other was a non-resident of the State. Neither of them was ever notified by the grantor of the deed. In 1867 the defendants, Bamberger, Bloom & Co., and others, creditors of Miles H. Mayes, filed their bill to subject the interest of Mayes in said property to the satisfaction of their debts, and such proceedings were had that a decree was rendered in said suit for the sale of the property, first to satisfy the unpaid purchase money, and then to apply the surplus proceeds of sale to the satisfaction of the demands of the complainants. The land was sold, and after satisfying the debt of the vendor there remained a surplus of about $1,200. At this stage of the proceedings, on the 29th of January, 1870, McEwen and Tompkins filed this bill to have the benefit of the conveyance of the 16th of November, 1865, and, acquiescing in the sale made, to have the surplus proceeds applied to the satisfaction of their demands. The chancellor rendered a decree in conformity with the prayer of the bill, and the defendants, who are creditors of Mayes, have appealed.

The present complainants say in their bill that they

had no notice of the execution of the deed of Mayes to them, and were not aware of its existence until a few days before the filing of their bill, when it was accidentally seen upon the register's book by one of their counsel in examining into the title of the property. Under these circumstances the first question which arises is whether the deed was intended in good faith for the purposes expressed on its face, or was a mere fraudulent device resorted to by Mayes to hinder and delay his creditors. If the deed was fraudulent in fact or law on his part, no presumption of acceptance by the nominal grantees can arise. *Townsend* v. *Harwell*, 18 Ala., 301; *Stewart* v. *Spencer*, 1 Curt., 157; *Baldwin* v. *Peet*, 22 Texas, 708. For, says Mr. Justice Curtis, in *Stewart* v. *Spencer*, the law cannot deem such a deed beneficial to the creditors, and the presumption on which his assent rests necessarily fails. The peculiar features of this deed are that no trustee, resident in the county, has been selected to execute the trust; that no home creditor is secured; that two creditors at a distance are selected as grantees and beneficiaries without any previous consultation or subsequent notice; that the possession of the property was reserved to the grantor for four years, although the debt secured was comparatively small, if the beneficiaries should discover the deed and accept it; and that the grantor kept his own counsel, saying nothing of the deed to any one. Although the probate of a deed, and delivery of it to the register for registration for the benefit of the beneficiaries might, under some circumstances, be considered a de-

livery to the grantees (*Tompkins* v. *Wheeler*, 16 Pet., 106, 115), yet registration alone, nothing more appearing, would not suffice to establish a delivery. *Brevard* v. *Neely*, 2 Sneed, 170; *McEwen* v. *Troost*, 1 Sneed, 191; *Johnson* v. *Roland*, 2 Baxter, 203, 210. There should be some act or declaration of the grantor evidencing an intent that the instrument should take effect as a deed, and that he had done all that he thought necessary for the purpose. In the absence of any, the slightest evidence on the part of the present grantor that he intended more than a form, it is difficult to avoid the conclusion that the instrument and its registration were resorted to merely as a fraudulent device for the grantor's private benefit.

If, however, it be conceded that the grantor, as far as he actually went, was influenced by no sinister motive, the question would still remain whether what was done would give the grantees a right to the property superior to that of other creditors of the grantor, who had secured a lien on the property two or three years before the grantees had any notice of the existence of the deed.

In England, a deed of trust which is not executed by the creditors is looked upon as a conveyance made by the debtor for his own convenience, which he may control, alter or revoke at his pleasure, and which will not avail against other creditors who may acquire liens. *Walwyn* v. *Coutts*, 3 Mer., 707; *Garrard* v. *Lauderdale*, 3 Sim., 1; S. C. on Appeal, 2 R. & M., 451; *Acton* v. *Woodgate*, 2 M. & K., 492; *Simmonds* v. *Palles*, 2 J. & L., 489; *Johns* v. *Johns*, 8

Ch. Div., 744. Upon the strength of the earlier of these decisions this court has held that if a debtor conveys property in trust for the benefit of creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed will merely operate as a power to the trustees, and is revocable by the debtor, provided the revocation be made before the creditors receive information and accept the trust. *Galt* v. *Dibrell*, 10 Yer., 147; *Robertson* v. *Sublett*, 6 Hum., 313; *Brevard* v. *Neely*, 2 Sneed, 165; *Mills* v. *Haines*, 3 Head, 332. But these cases concede that the trust becomes irrevocable by the acceptance of the beneficiaries, and that the presumption is that they have accepted its benefits. The doubt was whether the presumption of acceptance alone would suffice in a contest as to priority of liens between the beneficiaries and other creditors. In *Mills* v. *Haines, ut supra*, this doubt was resolved against the sufficiency of the presumption, while in *Furman* v. *Fisher*, 4 Col., 626, the ruling was the other way. The weight of American authority, where the assignment is made to a trustee under such circumstances as to amount to a delivery by the grantor, and is otherwise valid, tends to sustain the sufficiency of the presumption of acceptance as against other creditors. *Marbury* v. *Brooks*, 7 Wheat, 555; S. C. 11 Wheat, 78; *Halsey* v. *Whitney*, 4 Mason, 206; *Nicoll* v. *Mumford*, 4 J. Ch. 529; *Scull* v. *Reeves*, 2 Green Ch., 84, 131; *Ingram* v. *Kirkpatrick*, 6 Ired. Eq., 462. And our decisions are now in accord with the current. *Farquharson* v. *McDonald*, 2 Heis., 404, 419; *Wash-*

ington v. *Ryan*, 5 Baxter, 622. It is, however, still an open question how far the rights of the beneficiaries will be affected by proof of the positive refusal of the trustee to accept the deed, or by the intervention of unsecured creditors, before acceptance by the trustee or the beneficiaries.

Delivery and acceptance seem to be as essential to the validity of a deed of assignment for the benefit of creditors as of any other common law deed conveying land. Burrill on Assignments, 305; Perry on Trusts, sec. 593; *Brevard* v. *Neely*, 2 Sneed, 172; *Johnson* v. *Roland*, 2 Baxter, 203. Neither the delivery nor the acceptance need, however, be formal, the intention of the grantor that what was done should operate as a delivery, and the intent of the grantee to accept the benefit being sufficient, and the intent of either or both may be implied from admissions, conduct or circumstances. *McEwen* v. *Troost*, 1 Sneed, 186, 191; *Nichol* v. *Davidson county*, 3 Tenn. Ch., 547. As between the grantor and grantee, these principles are universally recognized. And it seems to be equally conceded that, as between the same parties, the refusal of the trustee to accept will not vitiate the trust, and that the beneficiaries would, nevertheless, be entitled to have the trusts executed. *Field* v. *Arrowsmith*, 3 Hum., 442; Burrill on Assignments, 307. The doubt is whether unsecured creditors may not acquire a superior lien between the execution of the deed and its acceptance by the trustee or the beneficiaries, or both. And the authorities are neither uniform nor clear upon these points. The text books seem to

consider an acceptance essential, and that other creditors may acquire rights at any time before actual acceptance. Burrill on Assignments, 305; Perry on Trusts, sec. 593. The weight of authority is that whenever the title to the property has vested in the trustee, the rights of the beneficiaries become fixed, unless they actually dissent. Burrill, 306, citing *Brevard* v. *Neely*, 2 Sneed, 171; *Brooks* v. *Marbury*, 1 Wheat, 78; *Stewart* v. *Speneer*, 1 Curtis, 166; *Seal* v. *Duffy*, 4 Barr, 274. An acceptance by the beneficiaries seems to be equally efficacious, although the trustee dissent. Burrill, 307, citing *Seal* v. *Duffy*, 4 Barr, 274; *Webb* v. *Dean*, 21 Penn., 29; *Reynolds* v. *Bank of Virginia*, 6 Gratt, 174; *Dawson* v. *Dowson*, Rice Ch., 243; *Field* v. *Arrowsmith*, 4 Hum., 442; *Brevard* v. *Neely*, 2 Sneed, 164; *Harris* v. *Rucker*, 13 B. Mon., 564; *King* v. *Donnelly*, 5 Paige, 46.

The difficulty in this branch of the subject is in determining the status of the property before acceptance. Chancellor Walworth was of opinion that where land is devised to trustees, and all the devisees decline the trust, the legal estate must of necessity vest in the devisees for the benefit of the *cestui que* trust, for the reason that they cannot defeat the intention of the testator by their refusal. *King* v. *Donnelly*, 5 Paige, 46. In a similar case, this court was of opinion that the legal estate would vest in the heir of the devisor, subject to the trust. *Goss* v. *Singleton*, 2 Head, 67. Under a deed of assignment for the benefit of creditors, the Supreme Court of Pennsylvania seem to hold that until acceptance the title re-

mains in the assignor, or, upon the refusal of the assignee to accept, revests in him as by way of remitter, but not so as to affect the rights of beneficiaries accepting the trust; and if the court appoint other trustees, at the instance of the beneficiaries, that the title will pass to such trustees. *Read* v. *Robinson*, 6 W. & S., 329; *Seal* v. *Duffy*, 4 Barr, 274; *Webb* v. *Dean*, 21 Penn., 29. The Supreme Court of South Carolina have applied the principle enunciated by Chancellor Walworth to the case of a deed of assignment, and held that a delivery to a third person would be good as to the beneficiaries, and the trustee would not be allowed to dissent to their injury. *Dawson* v. *Dawson*, Rice Ch., 245. Our cases are in accord in the conclusion, but leave the principle of the decision undetermined. 2 Sneed, 171; 3 Hum., 442.

In principle, I think the true rule is that the acceptance of the trustee passes the title, and the beneficiaries may always come in under the deed unless they dissent; and that where the grantor has done all that is necessary to constitute a delivery, there is such a declaration of trust, whether the title passes or not by reason of the refusal of the trustee to accept, as will make the assignment effectual and irrevocable, as against third persons, upon the acceptance of the beneficiaries within a reasonable time. What is a reasonable time must depend upon the circumstances of the particular case. A failure to aver acceptance in a contest with unsecured creditors after the lapse of two years from the execution of the assignment, has been held sufficient to let in the unsecured cred-

itors who had acquired, in the interim, liens by attachment. *Dews* v. *Olwill*, 3 Baxter, 432. The delay and want of knowledge in the present case have been for a period of more than four years.

Another difficulty exists in this case. There is no trustee, and the deed of assignment is made directly to the nominal beneficiaries. Their assent is necessary both to pass the title and validate the trust. *Nicoll* v. Mumford, 4 Johns Ch., 572; *Tompkins* v. *Wheeler*, 16 Pet., 106; Perry on Trusts, sec. 593. Their assent may, it is true, be presumed, but the presumption is rebutted by the express declaration in the bill that they were not aware of the existence of the deed, and, of course, did not assent to it until a few days before the bill was filed. In the meantime, and two years previously, other creditors had acquired liens by attachment. There is neither adjudicated case nor principle upon which the acceptance, after such a lapse of time and under such circumstances, can be held to override the liens thus acquired.

I am of opinion, therefore, that the complainants are not entitled to the relief sought, and that the chancellor's decree should be reversed and the bill dismissed. But under the circumstances the entire costs ought to be paid out of the fund in controversy.

DEADERICK, C. J., delivered the following dissenting opinion:

On the 29th of January, of 1870, complainants filed their bill in the chancery court at Columbia.

They allege that they are creditors of M. H. Mayes, and that said Mayes, on November 16, 1865, executed to them a mortgage on two store-houses in Columbia to secure said indebtedness, and acknowledged said mortgage before the county court clerk on the same day, and that it was registered on the 29th of November, 1865. That defendants, creditors of said M. H. Mayes, having obtained judgments against him, filed their attachment bills in said chancery court in 1867 attaching said store-houses, and pray for the sale of the same, and after paying unpaid purchase money, they ask the court to apply the residue of the proceeds of the sale to the satisfaction of their debts.

It appears that under this bill of Bamberger and others, the store-houses were sold in 1869, yielding some $1,200 or $1,300 more than balance of unpaid purchase money. The sales were confirmed.

Complainants in this case had no knowlege of these proceedings, not having been parties to the case in which sale was ordered, and the parties in that case probably having no actual knowledge of the complainants in this having a mortgage on the said store-houses; nor had the complainants in this case any knowledge that such a conveyance had been made to secure their debts until after the confirmation of the sale of the store-houses in the cause of Bamberger, Bloom & Co. and others against said Mayes. As soon, however, as they ascertained such a deed had been made and registered, they filed this bill claiming the benefits of said deed. All the attaching creditors of Mayes, and the purchasers and Mayes are made

defendants to this bill. The mortgage recites that Mayes owes Galloway for purchase money, three notes each for $1,250, due respectively June 8, 1867, 1868 and 1869, and stipulates if Mayes shall pay these notes, and also the amount due Tompkins (about $1,000), and the amount due McEwen (about $1,500), when the last note to Galloway is due (June 8, 1869), the conveyance is to be void, otherwise they may sell the lots, and after paying Galloway the purchase money which may be due him when the last note to him falls due, apply any surplus to their claims.

Upon the answer of defendants, who were creditors, the chancellor decreed in favor of complainants, and said defendants have appealed to this court. It is here insisted that the deed on its face retains the possession in the grantor for an unreasonable time, the stipulation being that the maker of the deed was to retain possession until the last note to Galloway the vendor, shall fall due, June 8, 1869.

Mayes had bought the lots he conveyed to complainants of Galloway, and owed him three notes yet unpaid, falling due respectively June, 1867, 1868 and 1869, and if he should pay his notes due in 1867 and 1868 when due, Galloway, who had put him in possession of the property, could have taken no steps to dispossess him or sell the property until June, 1869, when the last note fell due, and then only if he failed to pay that note. Mayes, therefore, was entitled to the possession of the property, and to retain it under his contract of purchase from Galloway until he made default, and it was not an unreasonable delay to post-

pone the right of complainants to sell to the same time, June 8, 1869.

It is also argued that the provisions of the deed were not accepted by complainants within a reasonable time after its execution and registration. Within a few months after the last note for unpaid purchase money for the premises became due, and the fact of the execution of the deed to them to secure their debts became known to complainants, they file their bill to enforce their claim against the proceeds of the sale of the houses. They had not known of the deed to them before a sale was ordered, but their bill was filed electing to affirm the sale and take the proceeds before any distribution thereof was made. This was some four years after the execution and registration of the deed to them, and some twenty-four or more months after the filing of their attachment bills by Bamberger, Bloom & Co. and others. And it is insisted that complainants not having before signified their acceptance of the provisions of the deed made to them and for their benefit, their claims must be postponed to those of the attaching creditors. In the case of *Washington* v. *Ryan*, 5 Baxter, 622, it was held that a deed of trust being always made for the benefit of the *cestui que trust*, his acceptance or assent thereto will *always* be presumed *in the absence of proof to the contrary*. In our State most or perhaps all of the decisions have been upon deeds conveying the estate to a trustee for the benefit of the creditors. But in 2 Perry on Trusts, sec. 602, p. 155, it is said, "Mortgages containing powers of sale and deeds of

trust to secure a debt due to a creditor, are substantially the same thing in law and equity. At law, both kinds of deeds purport to convey the legal title to the grantee, or creditor or trustee; but in equity the land, the title and the deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt." It is the creditor who is intended to be benefited in either case, and he may accept or repudiate the conveyance. And a trustee in a deed of trust cannot defeat or prejudice the rights of the beneficiaries. He may refuse to act, but a court of equity will not permit the trust to fail for want of a trustee. 4 John C. R., 136; 1 Head, 206. If, therefore, a trustee may be dispensed with, or another appointed in his stead by the court, where the maker of the deed has appointed one who refused to act, we conclude that a mortgage with power of sale and deed of trust are as stated in Perry on Trusts, "substantially the same thing in law and equity—the debt the principal thing and the conveyance of the land a security for it."

In England, a conveyance for creditors to a trustee not communicated to them, and they not being parties thereto, may be revoked at the will of the assignor. But the rule is different in the United States. If an assignment, not fraudulent, is made to trustees for the benefit of creditors, their assent *is not necessary*, or their assent *will be presumed* in all cases if it is for their benefit and contains no unusual clauses. 2 Perry on Trusts, secs. 593, 602. It may be now

considered as settled, in relation to conveyances for the benefit of creditors, that in Tennessee the presumption is that the benefits intended by the conveyances are accepted by the beneficiaries. But the questions as to the effect and duration of such presumption, and how it may be or is removed, does not seem to be as fully settled or understood.

In the case of *Washington* v. *Ryan*, it is said that a presumption is *prima facie* proof of the fact presumed, and that unless the fact thus presumed is disproved, it must stand as proved. 5 Baxter, 634. Will the mere lapse of time, without other circumstances tending to show an abandonment of the benefits conferred by the deed, be sufficient to rebut the presumption? This court said, as far back as 1830, in the case of *Breedlove* v. *Stump*, quoting and adopting the language of Chancellor Kent in the case of *Moses* v. *Murgatroyd*, 1 Johns C. R., 119, that "the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security given by the principal debtor to his surety. These collateral securities are, in fact, trusts, created for the better protection of the debt, *and it is the duty of the court to see that they fulfill the design.*" And whether the plaintiffs were apprized at the time of the creation of the security is not material. The trust was created for their benefit, or for the better security of the debt, and when it came to their knowledge they were entitled to affirm the trust and enforce its performance. 3 Yerg., 264, citing 1 Johns. Cas., 205; 2 Johns Ch.,

418; 4 Johns Ch., 136. This was said in reference to an indemnity taken by a surety, and not by the creditor himself. But the court say, in fact, it was a trust for the better protection of the debt, and that the court should see that it was applied to this object. And it is accordingly held that the creditor may enforce its performance when the fact of the execution of the trust comes to his knowledge, although he knew nothing of it when first executed.

In answer to the argument that complainants did not make their election to accept this trust, the learned special judge who delivered the opinion of the court said, "I am of opinion that the trust being for their benefit, the law will presume an acceptance." He then refers approvingly to the case of *Shepherd* v. *McEvers*, 4 Johns Ch., 136, in which a trust deed was made in June, 1807, to secure a debt due a firm in England, but without their knowledge. In October, 1807, the trustee and debtor made another trust upon the property, revoking the first. Shepherd, one of the creditors secured in the first trust, in June, 1816, nine years after the execution of the trust in his favor, and more than eight years after its attempted revocation, filed his bill, and the chancellor gave him relief, holding the first deed still valid, and declaring that the trustee, having accepted the trust, could not denude himself of it without the consent of the *cestuis que trusts*, or the order of the court. Nor does it appear that the beneficiary had knowledge of the execution of the trust deed in his favor before the filing of his bill.

In the case of *Fields* v. *Arrowsmith*, Judge Turley says, "A deed of trust being always made for the benefit of the *cestui que trust*, the assent of the trustee is not necessary to its validity; it is true he may refuse to execute the trust, but in that case a court of chancery will execute it for him, and the assent of *cestui que trust* may be given at any time after the deed is made, and will always be presumed in the absence of proof to the contrary." 3 Hum., 444. Here the idea is again presented that the primary object of the court should be to carry out and enforce the trust according to its intention and purpose. The rights of the beneficiaries cannot be affected by the refusal of the trustee to act. They may accept at any time, and the law presumes they accept until it is proved that they have refused to do so. No time is fixed, in any of the cases, within which they must accept or be deprived of the benefits intended. The language of Judge Turley in 3 Hum., as above quoted, was repeated and approved in an opinion by Cooper, special judge, and now a member of this court, in the case of *Saunders* v. *Harris*, 1 Head. 206. The cases in 3 Yer. and 3 Hum., herein recited, were again referred to and appoved in the case of *Furman* v. *Fisher*, 4 Col., 630.

It is laid down in Bump. on Fraudulent Con., 350, treating of assignments for the benefit of creditors, that a delivery of the deed in fact or in law, to some person or into some place, beyond the debtor's control, is indispensable. A delivery to the clerk to be recorded, or to a third person, or a deposit of it

in the post-office, is sufficient delivery. *McEwen* v. *Troost*, 1 Sneed, 186; 2 Sneed, 164.

Here we have a delivery to the clerk, an acknowledgement by the maker, and registration of the deed. No evidence is found of any fraudulent intent by the maker, none, as we think, can be fairly deduced from the facts as against him, nor does there appear to be any such intent or collusion on the part of the grantees. And even if there were any circumstances in the case from which fraud upon the part of the maker could be inferred, this would not avoid the deed unless participated in by the grantees. Bump. on F. C., 365; 9 Yer., 325, and numerous Tennessee cases.

The deed then having been, in contemplation of law, delivered and accepted, conveying the land to complainants to secure their debts, is irrevocable by the maker or mortgagor. Perry on Trusts lays it down as a universal rule that a power coupled with an interest is irrevocable; and as a power of sale inserted in a mortgage or contained in a deed of trust to a creditor to secure a debt, or to a third person for his benefit, is a power coupled with an interest; it cannot be revoked by any act of the grantor or donor of the power. Vol. 2, p. 160, sec. 602. He adds, "The debt remains, the right or lien on the property remains, and the power is coupled with them. In other words, the power is annexed to the property, and is an irrevocable part of the security, and goes with it."

In this case, in my opinion, there is no ground for the imputation of a fraudulent purpose on either the grantor or grantees, and there is sufficient evidence of a delivery and acceptance of the deed; and the deed having been duly registered after voluntary acknowledgement, the title passed out of the grantor irrevocably, except upon condition of the payment of the purchase money and complainant's debts. And in this state of facts I am further of opinion the attaching creditors, by their bill and writ of attachment, could acquire no other right than such as their debtor had at the time of the filing of their bills; that is, the right to any surplus of proceeds of sale of property after satisfying the secured debts.

In the case of *Farquharson* v. *McDonald*, 2 Heis., 418, it is said, "Upon the registration of the deed McDonald (the debtor) was divested of the legal title, and the law presumes that the benefits designed for the beneficiaries will be accepted by them, and the title vests in the trustee, irrevocable by the grantor, to await the election of the beneficiaries."

Chief Justice Nicholson further says, "While it is true that all the beneficiaries under a trust deed are presumed to accept its benefits, it is equally true that they may repudiate and reject the deed. And any distinct and unequivocal act of renunciation and repudiation of the benefits of the deed by any of the creditors intended to be benefited, will operate as an estoppel against further claims under the deed."

In Sto. Eq., sec. 1036a, the same doctrine is quite

as strongly declared. It is there said, it is not necessary that the creditors should be technical parties to the deed, the assent to it will be presumed. A general assignment, *bona fide* made, assented to by the assignee, is good against attachments or execution, unless all the creditors for whose benefit it is made repudiate it. And where a time is specified within which creditors are to assent, they must come in within the time, unless by reason of absence, or some other cause, a creditor has not, within the prescribed time, had knowledge of the assignment. Here, it seems, ignorance of the existence of the assignment, so far from raising any presumption of renunciation is a ground for extending the time within which to make an election.

It would seem from this review of the cases that the presumption of acceptance arises without reference to the question of the knowledge or ignorance of the beneficiaries of the fact of the execution of the trust deed for their benefit, and that this presumption stands until removed by some distinct and unequivocal act of renunciation; that when the deed is executed and registered the title vests in the grantee, and the creditor cannot revoke it. A deed, then, to secure creditors, duly executed and registered, with the legal presumption of the acceptance of its benefits by them, being notice to creditors of the grantor, ought not to be declared of no validity against them until, by some unequivocal act, they manifest a purpose not to claim under it.

In this case there is no act or declaration of re-

nunciation of the benefits of the deed. The conveyance is directly to complainants by the debtor, with power to them to sell when the last note executed by the debtor to his vendor for unpaid purchase money of the conveyed premises fell due, which was about three and a half years after the date of the mortgage deed. They were directed first to pay balance due for purchase money, and the surplus, if any, to apply to the payment of their debts.

In my opinion there can be no ground of complaint because of extension of time, because the debtor had bought the property upon time, the last payment falling due in about three years and a half from the date of the sale, and complainants were empowered to sell at the expiration of this time if all the purchase money and the debts due to them were not then paid. The vendor and vendee had agreed upon the times for the payment of the purchase money, which they might lawfully do, and it was competent for the vendee, in executing his deed, to stipulate that the land should not be sold for the secondary liability until the whole debt for which it was primarily liable fell due. Within six months after this time the complainants, who had but recently before ascertained that a deed had been made to them to secure their debts, filed their bill to enforce their right under the deed. What evidence is there in this case that they ever intended to renounce the benefits of the deed? If the title was vested, irrevocably as against the grantor, to await the election of the beneficiaries, and if the legal presumption existed in their favor until they

made an election to take the benefits under their bills, filed within six months after they knew of its provisions, when and how have they lost their rights? Certainly not by any "distinct, unequivocal act of renunciation," and we think not by the delay of six months to sue after their rights under the deed accrued. No creditor was injured. The deed was registered, and notice to all that the grantor had divested himself of his right to the property to secure creditors, and that the sale for this purpose was to be made if the purchase money and debt remained unpaid when the last payment for the purchase money fell due. Complainants could not move before this, and shortly after their right to sell accrued they ascertained the fact of the execution of the deed and filed their bill. If they had known from the time of its execution that the deed was made, and did no act to indicate renunciation, the legal presumption would still have operated, and being ignorant of the making of the deed, the legal presumption of acceptance would not be rebutted by the fact of their ignorance of its execution. The case of *Dews* v. *Olwill* is not in conflict with this opinion. Two years after the creditors had attached the property in that case, Mrs. Doyle was made a defendant, and did not then or at any time accept the benefits of the deed, and the court, in deciding this case, expressly confine its opinion to this precise state of facts.

Upon the facts in this case I am of opinion that complainants are entitled to the fund after satisfying the vendor's lien, and that the chancellor's decree should

be affirmed. I therefore dissent from the opinion of a majority of the court.

Judge TURNEY concurs in this dissenting opinion.

JACKSON, MORRIS & CO. v. NIMMO & THORNHILL.

CONSTITUTIONAL LAW. *Chancery Courts. Increased Jurisdiction.* The Act of the Legislature, passed March 23, 1877, conferring jurisdiction on the chancery courts of "all civil causes of action now triable in the circuit court, except for injuries to person, property or character, involving unliquidated damages," is constitutional.

FROM SUMNER.

Appeal from the Chancery Court at Gallatin GEO. E. SEAY, Ch.

JOHN J. VERTREES for complainants.

_____ for defendants.

FREEMAN, J., delivered the opinion of the court.

The act of the Legislature, passed March 23, 1877, entitled "An act to increase the jurisdiction of the chancery court," is as follows:

"That jurisdiction of all civil causes of action now triable in the circuit court, except for injuries to per-

son, property or character, involving unliquidated damages, is hereby conferred upon the chancery court, which shall have and exercise concurrent jurisdiction thereof along with the circuit court."

Sec. 2 is: "That from and after the passage of this act, no demurrer, for want of jurisdiction of the cause of action, shall be sustained in the chancery court except in cases of unliquidated damages for injuries to person, property or character."

The intention of the Legislature is plainly expressed. It is to *increase* the jurisdiction of the chancery court. That increase is to be effected by giving the chancery court jurisdiction, concurrent with the circuit court, of all causes of action now triable in the circuit court, except injuries to person, property or character, involving unliquidated damages. This statement of what is the intention of the Legislature, taken from the language of the act, of itself is so clear and plain that we cannot misunderstand it, and find no need for the application of rules of construction. It cannot be made clearer or plainer than the act has made it.

The question for investigation, and the one on which whatever of difficulty there is hinges, is the law in accord with the Constitution of the State? If it is, then the courts have but one duty to perform, after ascertaining its meaning, that is, to enforce it.

The policy of the enactment is not the question. That can have but little if any influence upon the action of this court. The policy of a statute, or its injurious tendencies, may legitimately be looked to on the question of whether the language shall receive a

liberal or strict construction. But this aspect of a law has no bearing of any perceptible weight on the question of the accord of the law with the Constitution. That must be ascertained, under our system of written constitutions, when the law is to be tested by the Constitution of the State, by finding in the Constitution an express prohibition to the exercise of the power under which the law is enacted, or a fairly implied prohibition, to be derived from a just construction of such express prohibitions as may be found in that instrument. 8 Heis., 686.

We may assume it to be axiomatic in American constitutional law, that State Legislatures, representing the soverignty of the people, have all legislative or law-making power, not prohibited by the Constitution of the United States or the Constitution of the particular State, either expressly or by necessary and fair implication.

This conceded, what are the provisions of the Constitution of the State bearing on this question? They are but few, and not difficult of construction it might seem, yet on close inspection may present in some of their aspects a very wide field for discussion.

The first is art. 6, sec. 1, it is: "The judicial power of this State shall be vested in one Supreme Court, and in such circuit, chancery and other inferior courts, as the Legislature shall, from time to time, ordain and establish, in the judges thereof and in justices of the peace." Then follows provisions as to the constitution of the Supreme Court, with its jurisdiction, the mode of election of the judges, both of

supreme, circuit and chancery courts; in a word, the whole machinery of the system, so far as deemed necessary at the time, is provided for, and the system completed.

The 8th section of the same article of the Constitution is then added in these words: "The *jurisdiction* of the circuit, chancery and other inferior courts shall be as now established by law, *until changed* by the Legislature."

The first section quoted is simply the distribution of the judicial power of the State by establishing or directing there shall be a Supreme Court, circuit, chancery and other inferior courts, and justices of the peace, in which tribunals this power shall be lodged and exercised. Beyond question this system of courts is established and ordained by the Constitution as constituting the judicial department of the government.

In ascertaining what was intended by the convention by the terms used, we must, it is true, as said by the Court of Appeals of New York, "keep in mind that the Constitution was not framed for a people entering into political society for the first time, but for a community already organized and furnished with legal and political institutions adapted to all, or nearly all, the purposes of civil government, and that it was not intended to abolish these institutions, except so far as they were repugnant to the Constitution then framed. It would be impossible to understand from the terms used in the Constitution alone what was meant or intended by "circuit courts," but by reference to our existing institutions, and the laws

regulating them, as well as the history and traditions of our State, we readily know that this is a court of law as contradistinguised from a court of chancery; that the one administered its remedies and enforced the rights of the citizen by the machinery or forms of what was and is known as the forms of law, and the other did the same thing within its sphere of action by the forms and machinery known as the mode of procedure as a court of chancery. The one used the declaration, stating the cause of action by the plaintiff, with pleas traversing or denying, confessing or avoiding the cause of action stated, and so on by successive steps until an issue was made between the parties, and this issue was decided for or against the parties under prescribed regulations, and judgment rendered accordingly. The other proceeded by bill or petition, with answer by defendant, with other incidental steps; the case was heard and decided by the chancellor, and a decree adjusting the rights of the parties, both complainant and defendant, and then enforcing such decree by appropriate orders or process. Thus, by reference to the state of things existent at the time, we are able to get a pretty clear knowledge of the mind of the convention when they used the terms "circuit and chancery courts."

The law under discussion must, then, be tested by its accord with the Constitution, understood by the light of the existent state of things at the time and previous to the adoption of the Constitution. It is an enactment of the Legislature of the State, and is operative unless in violation of the express terms, or

fairly implied provisions of that instrument. No express prohibition to its enactment is found. It can only be attacked, then, by finding a clearly implied or fairly inferred prohibition. This is to be made out from the language quoted distributing the judicial power, that is, that "it shall be vested in such circuit, chancery, and other inferior courts as the Legislature shall, from time to time, ordain and establish." The conclusion sought involves the affirmation of the proposition that this language, by fair and just implication, fixes and defines the limits of the jurisdiction of these courts. This must be so, for if it does not fix or define the limits of jurisdiction, then the Legislature could not have violated its requirement by increasing the jurisdiction of the chancery court, that is, simply extending the sphere of the powers of that court. This is a legitimate exercise of the law-making power, unless some limit is prescribed to its exercise by the Constitution. There being, as conceded, no express prohibition on this power in the Constitution, the inferential prohibition must be had from the article cited. This inference necessarily involves the idea that the true limitations upon the jurisdiction of these courts may be ascertained from the language used by reference to the words used, or from their fair construction in the light of existent things at the time of the adoption of the Constitution. The proposition to be maintained is, the law is prohibited by the language, or fair implication drawn from it, of the Constitution. The language contains no prohibition that

reaches the question, the implication must, or the proposition fails.

The theory on which the argument must rest is, that the constitutional establishment or recognition of the chancery court, necessarily or by fair implication, involves the proposition that this court, with its then defined jurisdiction, was the purpose of the convention, that is, that by the clause of the Constitution not only is the judicial power distributed and courts mentioned ordained, but the jurisdiction of these courts also defined and their limits fixed. The only conceivable limit that could be fixed on their jurisdiction by the simple fact of their ordination would be that which they then possessed, for the inference must be drawn or implication made from their designation as circuit and chancery courts, and the idea that is conveyed by these terms in connection with the actual fact of the existence and traditions appertaining to that existence in our State polity at the time.

In order to make this influence effective to defeat the law before us, there must be derived from this section of the Constitution not only the existence of such courts, but also a fixed and defined boundary, either in fact or with reasonable certainty to be ascertained, or else there could be no violation of the constitutional jurisdiction that would invalidate an enactment of the Legislature either increasing or changing the limits of that jurisdiction; an undefined limitation would be impossible to be enforced, for its boundaries could not be ascertained so as to mark the point when the Legislature trespassed upon the constitutional inhi-

bition. This seems too clear for doubt or argument. The limit must be fixed, the boundaries of this jurisdiction defined by the language of this section, or else the Legislature is free to act as it may deem the public interest shall require. As we have said, we think the only conceivable limit that can be with any plausibility inferred in the case is, that the jurisdiction then possessed and exercised by the chancery court was intended to be fixed and established as its constitutional jurisdiction. From this view it would follow, however, that there could be no change in that jurisdiction after the adoption of the Constitution, certainly none by the Legislature, unless we assume that a change or alteration could be made by the Legislature in the Constitution itself, or that body have the right to give or take away what was prohibited or not given by the Constitution. This will not be claimed. This proposition involves, then, the fixedness for all time of the jurisdiction of this court, a constitutional congelation of the unstable elements of jurisdiction into a defined mass that cannot be diminished or enlarged by legislative action.

In this we think the argument would prove more than its advocates would be willing to maintain. The chancery court has been steadily advancing and widening the boundaries of its jurisdiction from its earliest history down to the present day. We need but refer to the familiar contest between Lord Coke and Ellesmere, in the days of James, as to the power of a court of chancery to enjoin parties from proceeding at law, in which the power was stoutly denied by Coke,

and as earnestly insisted on by the Chancellor. The court of chancery, as we know, succeeded in maintaining its ground, and thereby established its enlarged jurisdiction. Our books are full of such instances, familiar to any lawyer. Was it intended to stop and put an iron barrier in the way of the development of this source of jurisdiction of this court? We apprehend it will hardly be so contended, yet the argument inevitably leads to this, for if the Constitution has fixed, by any ascertainable limits, the jurisdiction of the court, then the court could no more increase or accrete jurisdiction than could the Legislature confer it. The one would be as much bound by the Constitution as the other. To both the Constitution is the supreme law before which they must yield. The limits of jurisdiction must be fixed or ascertainable, or else no law can be held to violate the Constitution that enlarges these limits.

Again, the circuit court is ordained and established in the precise same language as is the chancery court, and the same rules would have application. Is the jurisdiction of that court to be held to have been unalterably fixed by the Constitution too? Must we look to the jurisdiction then possessed by that court, and hold that no more can be given it either by the Legislature or by construction of law, or rather by the gradually encroaching principles inherent in our system, by which the courts themselves extend their jurisdiction to meet the wants of a wiser and more enlightened public policy, when such necessity is developed by experience?

We need not refer particularly to cases illustrative of this principle. We only mention such as the recovery on a lost note, or the half of a bank note, where the jurisdiction was formerly alone in equity, and the defense by a surety, when a lien or security taken for the debt has been released or lost by the creditor to his injury, where the remedy or defense is now allowed at law as well as in equity.

We need not reason further on this aspect of the question. The Constitution, we think, has settled it in unmistakable terms. The language of the 8th section of the same article is: "The jurisdiction of the circuit, chancery, and other inferior courts, shall be as now established by law, until changed by the Legislature." If the convention had stopped at the first clause of this section, it would have been precisely the provision which would have sustained the argument. The jurisdiction of all these courts would have been unalterably fixed within the limits as then defined and ascertainable by the then existent law. But we are compelled to give effect to the other clause. It is equally a part of the Constitution, that is, until changed by the Legislature. This language must be taken, as other language, to mean what it says, and a fair construction of it be given. It can only mean, we think, that there was no change made, or intended to be made, by the convention in the then existent jurisdiction of these courts, but that such change of jurisdiction, that is, enlargement or diminution of their sphere of action, was to be left, and was authorized to be made by the Legislature.

To hold otherwise would be not only to disregard the plain meaning of the language used, but also to involve us in consequences that would be most serious. The language, as is seen, applies not only to the circuit and chancery courts, but to all other inferior courts then existent among us. If the jurisdiction of the chancery court is unalterably fixed by the Constitution in any way, then unless this clause authorizes that jurisdiction to be changed, the jurisdiction of the circuit and other inferior courts would be equally fixed, and must so remain. But this clause most certainly authorizes the Legislature to change the jurisdiction of the other courts, and if so, it equally authorizes the change of the jurisdiction of the chancery court, and that is all that is done in the act under consideration.

This section serves to guide us clearly as to what elements of the complex ideas embraced in the words "circuit and chancery court" were in the mind of the convention, and intended to be imbedded in the Constitution and put beyond legislative action or change. These words have at least two, if not more, distinct facts or elements which are conveyed when we speak of these courts: one is of the one or the other court, with a judge or chancellor performing the judicial functions by means of certain forms or machinery in a certain mode, that is the one, as we have said, by the forms known as common law procedure; the other, that known as the chancery form of procedure. These elements or phases of the idea of a circuit or chancery court are not only separable and distinct in thought,

but equally so in fact, from the other element of jurisdiction or power to act judicially on a greater or less number of rights. While it is conceded that jurisdiction is an essential element for the action of a court, yet it is equally a court, whether that jurisdiction be over many or few questions or subjects of judicial action. The extent or narrowness of the jurisdiction exercised does not at all go to the idea of its existence intact, but only its efficiency to perform a larger or smaller function as an agency of government. This hardly need be illustrated. The court of chancery was as much a court of chancery in the days when its jurisdiction was confined to a few subjects as it is now, since its jurisdiction has, by gradual encroachment and accretion, been extended so as to embrace in some form the largest mass of the questions passed upon by our courts. In view of this we think it clear, from the first and eighth sections of the article from which we have quoted, that the preservation of these courts, with their distinctive features, modes of procedure and organism, substantially as independent and separate agencies for the exercise of the judicial power was intended—the courts to remain intact. But the matter of their jurisdiction is not so fixed, nor was it so intended. This was to remain as then until changed by the Legislature. To what extent the jurisdiction thus left under control of the Legislature may be changed, we could not definitely determine. The existence, however, of these courts as parts of the judicial power of the government, is beyond the power of the Legislature to de-

stroy. The courts are to be preserved intact, but what shall be the matter over which they shall exercise their powers subject to certain limitations involved in other clauses of the Constitution, is left to legislative discretion.

The distinction attempted to be pointed out is between the existence of a court as a concrete fact, and the jurisprudence which that court administers by the agencies of its organism. This distinction is found underlying the definition of equity jurisprudence as given by our standard writers. Judge Story says, in defining the distinctive features of equity jurisprudence: "In England and the American States, which have derived their jurisprudence from that source, equity has a restrained and qualified meaning. The remedies for the redress of wrongs, and for the enforcement of rights, are distinguished into two classes: first, those which are administered in courts of common law; and secondly, those which are administered in courts of equity. Rights which are recognized and protected, and wrongs which are redressed by the latter courts only, are called equitable rights and equitable injuries. Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law." From this the distinction is very clear, and the ideas of the court which administers, and the jurisprudence to be administered, and the jurisdiction exercised, is clearly seen. The court must necessarily be existent

before it can exercise jurisdiction at all, so that it is a separate and independent thing, both in thought, logic and fact, from the matter of its jurisdiction. This may be more or less extensive, may fluctuate be enlarged or diminished, and yet the court remains, as we have said, the same organic thing, ready to the work that may be assigned it, whether much or little.

We have discussed this question in its affirmative aspect thus far mainly. We turn for a moment to some of the limitations to the power of the Legislature, fairly implied and deduced from other portions of the Constitution, as well as from what we have maintained in this opinion. The courts mentioned are to be kept intact as organic judicial machinery of the State. Criminal cases cannot be transferred to the jurisdiction of the chancery court, because the Constitution has provided for indictment or presentment and a trial by jury, with the witnesses for the State to confront the defendant. A court of chancery by its organization can never perform these functions, therefore such questions cannot be included within its jurisdiction. Other cases may exist, but they do not occur to us at present, nor would such limitations be attempted to be marked more definitely in this opinion.

The act under consideration seems free from all objections. It does not deprive the circuit court of any of its jurisdiction—leaves that precisely where it stood before. It only adds to the jurisdiction of the court of chaneery by giving it concurrent jurisdiction over all civil cases except those specially mentioned as excluded. In fact, it has but gone one step further

than was the law before. In any civil case the complainant could have filed a bill in the court of chancery, and if no demurrer to the jurisdiction was interposed, and an answer put in, the court's jurisdiction was fixed, so that the consent of the parties really gave the jurisdiction, and so the law stood when the Constitution was adopted. Now the complainant has the option as to the tribunal in which he will have his case tried. Before that the option was with the defendant; that is practically all that has been done by the act. We can see no very dangerous innovation in this, certainly no infringement of constitutional prohibition.

It is maintained, however, that the act is proposed to change the character or to destroy the chancery court. We are totally unable to see the force of this objection, or to perceive any such purpose. As to the purpose, it cannot be derived from the act itself. The contrary purpose would seem to be the only legitimate inference, that is, to build up and enlarge the sphere of action of this court. It is difficult to see how it can be maintained that an enlargement of the jurisdiction of this court is evidence of any purpose to destroy or weaken it. This is an argument that would strangely contrast with the history and growth of the chancery court, which has steadily, by accretion, been extending its jurisdiction from the earliest periods to the present time. This has been understood heretofore to have been a continued increase and addition to its vigor, but, if the argument is sound, would be only evidence of its de-

cay, and tend to its ultimate destruction. Certainly increase of jurisdiction in this way cannot have the effect to invigorate, while a similar enlargement by an act of the Legislature is to have or be evidence of a purpose to attain an opposite result.

But it is maintained that this involves in some way the power to destroy the chancery court, or to turn it into a court of law. We do not see this result any more than we can see evidence of such a purpose on the part of the Legislature. The exercise of the power to increase the jurisdiction of a court, thereby giving it a more enlarged field of operation, does not involve the power to do the opposite, that is, to destroy. Whenever any law shall be passed with any such purpose, or any direct tendency to produce this result, we shall promptly strike it down as in violation of the Constitution which establishes this court. But seeing no such purpose in this act, we cannot arbitrarily assume it to exist.

It is said the clause of the Constitution providing that the jurisdiction of the court shall remain until altered by the Legislature, was only intended to secure the jurisdiction as it was—rebut the idea of change. This cannot be, for two reasons: first, the jurisdiction of these courts would have remained as it then stood without this clause: second, all laws are expressly kept in force not inconsistent with the Constitution by another clause. To give this clause any meaning, it must be held a reservation of power to alter the jurisdiction of the courts established, and as

a matter of course to enlarge or diminish, or else there could be no alteration.

The only other objection to be noticed is, the objection that by conferring the jurisdiction here given on the chancery courts, the right of trial by jury is impaired, as guaranteed by article 6 of the Bill of Rights.

Several conclusive answers may be given to this. First, if the power to enlarge and alter the jurisdiction is given in the Constitution, whenever it is rightfully conferred on the chancery courts, then that jurisdiction may be exercised according to the forms by which such courts are accustomed to administer remedies. This article in the Bill of Rights was never understood to apply to the administration of the law in such courts, and it has been held so in many other cases, such as formerly in cases of bastardy. *Kirkpatrick* v. *The State*, Meigs, 124.

But the conclusive reply is, that under the law as it stood at the adoption of the Constitution, and at present, the party may, at his option, have a trial by jury of all matters of fact arising in his case in a court of chancery. The act of 1846, and sec. 4465 of the Code, gives this right to either party in the amplest manner, the law being "that either party to a suit in chancery is entitled to a jury to try and determine any material fact, and all the issues of fact in any case shall be submitted to one jury." In the case of *James* v. *Brooks*, 6 Heis., 151, it is expressly held that the verdict of the jury in chancery cases is entitled to the same weight precisely as in a court of

law, and may be set aside in the same way, and when reversed in this court for error, the case is to be remanded for new trial in the same way as if it had been a jury trial at law.

As either party can have a jury trial at his option, his right cannot be held in any way impaired by having the trial in a chancery court; so that this objection has nothing in it, unless we say that the right to a jury trial is impaired in a case where the right may always and in any case be had, and that at the option of the party. This is all he could have in a court of law, for in that court he can at his option dispense with a jury, and submit his case to the court. If he chooses that his case shall be heard by a chancellor, certainly no one can seriously insist his right is impaired because he does not choose to avail himself of it.

As to the meaning of the act of the Legislature, we think it too plain and obvious to require discussion. We know what was meant, and if not in violation of the Constitution, it is our plain duty to enforce and carry out that meaning. The policy of the act is one with which we have nothing to do, and we shall not discuss it. We hold, therefore, the act to be constitutional, and the law of the land, and that the bill in this case can be maintained.

COOPER, J., dissented.

JOHN T. REDD *v.* JOHN T. BROWN.

JUSTICE OF THE PEACE. *Jurisdiction. Endorser.* Under the Code, sec. 4123, sub-sec. 2, justices of the peace had jurisdiction of endorsements of negotiable paper, on which demand and notice were not waived, to the extent of $250.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

JOHN S. WILKES for complainant.

N. SMITHSON for defendant.

COOPER, J., delivered the opinion of the court.

Bill filed to perpetually enjoin the collection of a judgment recovered by the defendant against the complainant before a justice of the peace. The chancellor dismissed the bill on final hearing, and gave judgment in favor of the defendant against the complainant and his sureties on the injunction bond. The complainant appealed.

The bill sought to impeach the judgment on several grounds, but it is conceded by complainant's counsel that the only question before the court is, whether a justice of the peace had, at the rendition of the judgment, jurisdiction to render a judgment against the endorser of a promissory note for an amount over

fifty dollars, where demand and notice were not expressly waived.

The judgment in controversy was rendered on the 18th of June, 1864, for $92.58, and the defendant, in his answer, admits that the recovery was had on the endorsement of the complainant, which did not expressly waive demand and notice.

The jurisdiction of justices of the peace was, in June, 1864, regulated by the Code, sec. 4123, subsecs. 1 and 2, and extended—"1. To five hundred dollars upon all notes of hand indiscriminately, whether calling for dollars and cents simply, or for an amount to be discharged in other means than money, or for an amount of any article or multiplicity of articles whatever, and upon endorsements of negotiable paper when demand and notice are expressly waived in the endorsement. 2. To all unsettled accounts, obligations, contracts, or other evidences of debt not embraced in the preceding section, when the amount claimed does not exceed two hundred and fifty dollars."

The first of these sub-sections gives a justice jurisdiction to the extent of $500 on all notes of hand indiscriminately, and upon endorsements of negotiable paper when demand and notice are expressly waived in the endorsement. The second sub-section confers jurisdiction to the amount of $250 over all unsettled accounts, contracts, "or other evidences of debt not embraced in the preceding section."

Broader language to give the restricted jurisdiction over all contracts and forms of indebtedness could scarcely be used. An endorsement of a negotiable

note is both a contract and an evidence of debt, and such an endorsement, expressly waiving demand and notice, having been mentioned in the preceding section, an endorsement without such waiver would naturally be included in the second sub-section. And if the latter does not confer jurisdiction over such endorsements, then justices have no jurisdiction thereof to any amount. The decisions of this court previous to the Code turn upon the peculiar wordings of the pre-existing statutes which were repealed by the Code.

There is no error in the decree, and it will be affirmed with costs.

D. C. Orr *et als.* v. Edgar E. Cox *et als.*

Husband and Wife. *May be witnesses. When.* Where husband and wife are parties to a suit, they are competent to testify for and against each other except as to facts acquired by virtue of their relation as husband and wife.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. W. P. Martin, J.

N. SMITHSON, W. H. MCCALLUM and LEWIS BROS. for Orr.

T. M. JONES for Cox.

MCFARLAND, J., delivered the opinion of the court.

This was an issue *devisavit vel non* to test the validity of the will of P. T. Cox, deceased. The will was established, and the contestants have appealed in error. The contestants were D. C. Orr and wife, and James J. Walker and wife, Mrs. Orr and Mrs. Walker being the daughters of the testator. Orr and Walker were examined as witnesses for the contestants, and, without objection, proving many facts bearing more or less upon the case. It was then proposed to prove by these witnesses certain transactions between the witnesses and the testator, and conversations between them both before and after the execution of the proposed will, for the purpose of showing the testator's want of capacity, and that the execution of the will was procured by the undue influence of Edgar E. Cox, the principal devisee and legatee, but the court refused to permit the witnesses to testify as to any transaction had with the testator, or to detail any conversations between them. The objection seems not to have been placed upon the ground that the witnesses were testifying upon behalf of their wives, the real parties in interest, but it seems to have been conceded that they were competent witnesses to testify in their own behalf under our statutes making parties

competent witnesses, and that they were subject only to the exception of the statute, to-wit: "In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify by the opposite party." T. & S. Rev. Stat., 3813d.

We held, two years ago at this place, in the case of *Beadle* v. *Alexander*, MS. unreported, that a contest over a will was not a suit by or against an executor in such a sense as to bring the parties within this exception, and that the parties were competent to prove conversations with or declarations of the testator bearing upon the issue. We held that an action of this character was a contest between those claiming under the will on the one side, and those claiming against it on the other, and that it does not fall within the reason or principle of the above exception. One of the principal legatees under the will in that case, a party to the cause, was permitted to prove statements of the testator vital to the issue. From this it results that the exclusion of the testimony, for the reason indicated, was clearly erroneous. If the witness was otherwise competent, there was no valid objection to the testimony proposed to be made. No objection was taken to the competency of the witnesses in other respects. But if a valid objection exists, it would perhaps be useless to reverse for this error, as it would be practically for no purpose.

We have seen that the witnesses, with their wives, were the contestants, and this presents another aspect of the question, so often before us recently, as to how far husband and wife may be witnesses for or against each other. It has been settled in a number of cases that our statutes removing incompetency upon the ground of interest or being parties to the cause does not remove the objection to the husband or wife when offered as witnesses for or against each other, so far as that objection rests upon grounds of public interest for the preservation of the sanctity of the marriage relation. This we regard as a sound and well settled rule.

The difficulty is as to how far the objection, upon grounds of public policy, ought to go, whether to exclude the husband and wife when offered for or against each other for all purposes, or only to exclude testimony in relation to such knowledge as they may have acquired by virtue of the marriage relation.

The question often arises, as in this case, where the husband and wife are joint parties. Then if neither can be a witness for the other, as both are parties, both must be excluded, while the party against them is competent, thus leading to manifest injustice. Yet we have in several cases held that both must be excluded without regard to the subject matter of their evidence. We have more recently modified this rule to the extent of holding that where the wife is the real party in interest, the husband being only a nominal party, the wife may testify in her own behalf, notwithstanding the husband is a party to the record.

See *Patton* v. *Wilson*, 2 Lea, 101, citing *Foster* v. *McVann*. But in all such cases neither husband or wife can testify as to facts coming to their knowledge by reason of the mutual relation, although that relation be severed at the time the witness is offered. *Wilson* v. *Patton*, 2 Lea, 101. In this latter case it is intimated that the true rule ought to confine the objection upon grounds of public policy to such facts as came to the knowledge of either husband or wife by means of their marital relation, and testimony as to these facts ought to be excluded without regard to the attitude of the husband or wife as parties, but as to all other facts they stand as other witnesses do as to whom the statute assumes all objection. Although we have several times held differently, in one instance in an opinion written by myself, yet I have never been satisfied with the holding, and think the rule ought to be as indicated in Wilson *v.* Patton, and that this is the only mode of reconciling the difficulties and placing the rule upon a basis consistent with sound reason.

In this case the court below seems to have regarded the husbands as the real parties, and admitted them to testify in their own behalf, but Mrs. Orr was offered as a witness and rejected altogether. It would have been more consistent, perhaps, to have admitted Mrs. Orr to testify for herself and rejected her husband, if either should have been rejected. The wife was the real party in interest, although it cannot be said the husband was a mere nominal party.

My opinion is that we ought to overrule former holdings upon the subject, and confine the objection

to the husband and wife to such facts as public policy excludes, that is, such as they acquire by reason of the mutual relation. As we have already modified and restricted our first holdings upon the subject for the reason that we were not satisfied with the result, I think the better way is at once to place our decisions upon grounds we believe to be sound in principle.

And there is now another reason for this course in the fact that the Legislature have recently amended the former acts and placed the rule upon the ground indicated, and made the husband and wife competent as other parties, except as to facts acquired by virtue of their relation as husband and wife. Acts of 1879, ch. 200. This act was not in force at the time this cause was tried, and we only refer to it to show that in adopting the rule indicated we are conforming to what is now the law by positive statute.

Many other questions have been presented as grounds of reversal, but as in our opinion the judgment must be reversed and a new trial awarded for the reason above given, it is unnecessary to notice them, as the cause must be tried by another judge, the presiding judge having died. We will not presume that the errors, if errors, will be again committed. The charge is probably subject to criticism.

Judgment reversed.

3L 623
5L 704
1pi 332

LINCOLN SAVINGS BANK *v.* W. J. RIDGWAY *et als.*

1. EQUITY OF REDEMPTION. *Rights of purchasers. Creditors.* A purchaser of an equity of redemption takes just such interest as the debtor had, to-wit, the right to redeem the land from the original purchaser, or any subsequent redeeming creditor, for two years from date of sale, and until it is exercised any judgment creditor has the right to redeem from the last redeeming creditor.

2. SAME. *Proceedings to sell the equity of redemption. Effect of.* During the pendency of a suit by a creditor to force a sale of the debtor's right of redemption, any other creditor may redeem, and is not thereby postponed.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

T. M. JONES and ROSE & TINNON for complainant.

N. SMITHSON for defendants.

TURNEY, J., delivered the opinion of the court.

The Giles National Bank, on the 26th of July, 1875, recovered a judgment against M. E. Eddins, J. J. J. Eddins, and W. G. Lewis, for $141.35. An execution was levied on a tract of land, the property of M. E. Eddins. The levy being too late to advertize and sell, an order of sale issued January 14, 1876. On March 11, 1876, a sale was had; W. G. Lewis became the purchaser at the bid of $1,470.55,

and being a judgment creditor of M. E. Eddins, advanced his bid by $58.95. On November 4, 1875, Lincoln Savings Bank obtained judgment against M. E. Eddins for $5,620.87, and on the 1st day of June, 1876, redeemed from Lewis and advanced the bid upon the land by the amount of its judgment, making in all $7,503.22. On the 24th of March, 1876, W. J. Ridgeway and A. G. Ezell, being judgment creditors of Eddins, filed their bill attaching the equity of redemption of Eddins, and asking its sale for the benefit of their debt. The sale was ordered, and was had on the 5th of May, 1877. W. J. Ridgway became the purchaser at $60. On the 21st of August, 1877, Lincoln Saving Bank filed its bill, one of the objects being to prevent a confirmation of the sale of the equity of redemption to Ridgway, to remove cloud from its title, etc. There was demurrer, which was overruled, and the cause appealed to this court.

By his purchase Ridgway took just such interest as Eddins had at the time of the attachment—nothing more, nothing less. At that time Eddins had the right to redeem the land from the original purchaser, or a subsequent redeeming creditor. This right continued for two years from the sale. Until it was exercised, any judgment creditor had the clear legal right to redeem from him who had last redeemed. If Eddins had failed to redeem, then at the end of two years the last redeeming creditor would take the title in fee, and the right of redemption by Eddins would be forever gone.

The purchaser of this right, standing in Eddins's

shoes, must have pursued the course the law required of Eddins, and having purchased the equity or right of redemption, but not having exercised it by actual redemption, he has acquired no superior right to other creditors in a race of diligence to secure debts—no preference can be shown him.

The pendency of suit by one creditor to force a sale of the debtor's right of redemption, in no way impugns the rights of other creditors to redeem, nor in any manner postpones them. The purchaser in this case has no right to a confirmation of his purchase to the prejudice of complainant.

This view of the case precludes the necessity of deciding the propriety or regularity of the proceeding to sell the debtor's right of redemption, or of the jurisdiction of the court to make the sale. We intimate no opinion upon these questions.

Affirm the decree.

3L 626
5L 213
6L 683
9L 60
9L 398
10L 563
11L 110
13L 483
14L 351
14L 595

R. A. F. Jackson *v.* Fannie W. Rutledge and Husband.

Married Woman. *Vendor's Lien.* If a married woman buy land, partly for cash and partly on time, and accept a deed of conveyance to her separate use, retaining a lien for the time instalments, she cannot have the money which she has paid refunded merely because of her coverture, and the lien reserved for the payment of the purchase money may be enforced in equity.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. Fleming, Ch.

W. H. McCallum for complainant.

N. Smithson and J. S. Wilkes for defendants.

Cooper, J., delivered the opinion of the court.

On the 13th of October, 1874, Fannie W. Rutledge, then and now a married woman, bought from J. H. Crenshaw a tract of land at the price of $3,144.60. She paid him in cash $1,500, being money collected from her late guardian by suit in the Chancery Court, and paid to her in person under orders of that court. She gave Crenshaw her two notes for $822.30 each, payable respectively on the 25th of December, 1876 and 1877. These notes were endorsed to the complainant, R. A. F. Jackson, for value, before maturity.

Crenshaw had bought the land from D. L. Gordon, and paid him therefor, but the legal title was still in Gordon. At the request of Crenshaw, Gordon made the conveyance by deed in fee direct to Fannie W. Rutledge, to her sole and separate use, reciting the consideration passing from her to Crenshaw, and retaining a lien on the land for the payment of the two notes given for the purchase money. Rutledge and wife went into possession of the land.

On the 15th of November, 1877, Jackson filed the original bill in this cause against Fannie W. Rutledge and W. W. Rutledge her husband, to enforce the lien reserved on the land for the payment of the purchase notes. The husband and wife answered jointly, admitting the sale and purchase of the land and execution of the notes as above stated. They suggest that Gordon's title to the land is defective, and insist that the notes, and the contract of purchase were void, because of the coverture of the defendant Fannie at the time. On the 2d of September, 1878, Rutledge and wife filed a bill, in the nature of a cross-bill, against Jackson, Crenshaw and Gordon, re-stating the facts as above, and asking for relief upon the ground of a defect of title, and that the contract of purchase was void for the reason just stated. The defendants to this bill filed a joint answer, in which they set out the facts touching Gordon's title to the land, and resist the relief sought. An agreed statement of facts was afterwards drawn up by the parties, upon which and the pleadings the cause was heard by the Chancellor, who sustained the validity of the conveyance

and subjected the land to the satisfaction of the unpaid purchase money under the lien reserved in the deed. He gave no personal decree against either the husband or wife. Rutledge and wife appealed.

It is conceded that the title to the land is good, and that Jackson, by the admission of Crenshaw and Gordon, is entitled to the unpaid purchase money, if it can be collected. The case turns, therefore, upon the point whether the lien reserved in the deed can be enforced. The counsel for the married woman insist that the sale and conveyance are void by reason of their client's coverture at the time they were made, and as a consequence, that she should have a decree against Crenshaw and Gordon for the money paid, which should also be declared a lien on the land, and that she should recover the value of permanent improvements, subject to an account for rents since she has been is possession.

"As to personal estate," says Lord Hardwicke, "undoubtedly, where there is an agreement that the wife shall have to her separate use either the whole or particular parts, she may dispose of it, though nothing is said of the manner of disposing of it." *Peacock* v. *Monk*, 2 Ves., 191. "I have always thought it settled," says Lord Thurlow, citing *Peacock* v. *Monk*, and a very old case in Tothill, "that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it." *Fettiplace* v. *Gorges*, 1 Ves. Jr., 46; S. C. 3 Bro. C. C., 8. Since this decision, the power of

a married woman to dispose of money or personal effects held to her separate use, where there is no restraint upon her power of disposition in the settlements, has been universally conceded. Our decisions are in accord. *Prewet* v. *Looney*, 8 Yer., 63; *Porter* v. *Baldwin*, 7 Hum., 175; *Martin* v. *Olliver*, 9 Hum., 566; *Powell* v. *Powell*, 9 Hum., 477; *Cox* v. *Scott*, Memp. L. J., 248. So, of the rents and profits of her separate realty. *Young* v. *Jones*, 9 Hum., 551; *Bottoms* v. *Corley*, 5 Heis., 11; *Ordway* v. *Bright*, 7 Heis., 681; *Cheever* v. *Wilson*, 9 Wall., 119. A married woman may, with separate means, or by the proceeds of property in which she has an interest, purchase property, personal or real, from her husband or a third person, and have it settled to her separate use. *Livingston* v. *Livingston*, 1 Johns. Ch., 537; *Lady Arundell* v. *Phipps*, 10 Ves., 139; *Liles* v. *Fleming*, 1 Dev. Eq., 185; *Pritchard* v. *Wallace*, 4 Sneed, 405; *Ready* v. *Bragg*, 1 Head, 512; *McClure* v. *Doak*, 6 Baxt., 368; *Tarbox* v. *Tonder*, 1 Tenn. Ch., 164.

It is true, the common law incapacity of a married woman to contract is fully recognized in this State. *Catron* v. *Warren*, 1 Col., 358; *Kirby* v. *Miller*, 4 Col., 3. She cannot, therefore, make a valid promissory note. *Sheppard* v. *Kindle*, 3 Hum., 80. She can only bind her separate estate, within the power conferred, by an express agreement and in the contract if in writing. *Cherry* v. *Clements*, 10 Hum., 552; *Ragsdale* v. *Gossett*, 2 Lea, 730. And any decree for specific performance can only be *in rem* against the specific property, not *in personam* against the married

woman. *Aylett* v. *Ashton*, 1 M. & C., 105; *Francis* v. *Wigzell*, 1 Mad., 258; *Young* v. *Paul*, 2 Stockt., 401; *Chatterton* v. *Young*, 2 Tenn. Ch., 771.

By reason of the personal incapacity of a married woman to contract, she cannot make an executory agreement to purchase land on credit, and pay the purchase money by instalments. It would be optional with her whether she would comply with her contract, or interpose her coverture in bar of the recovery of the money, or of a specific performance. *Morrison* v. *Kinstra*, 55 Miss., 71. So, where a conveyance has been made to a married woman, though not to her separate use, and she has reconveyed in mortgage to secure the purchase money, the mortgage is of no legal validity. *Concord Bank* v. *Bellis*, 10 Cush., 276; *Eaton* v. *George*, 40 N. H., 258. But even in such cases, equity has interposed by compelling the husband and wife, where the husband has thereby acquired an interest, to make a valid mortgage to secure the price, (*Leach* v. *Noyes*, 45 N. H., 364); or has upheld the mortgage as creating an equitable lien. *Hatch* v. *Morris*, 3 Edw., 313. Mr. Bishop's comment on the relative rights of the parties in such cases is this: "In a court of law, the conveyance to the wife must be held good, at least as between the parties; because, though, the mortgage being void, no consideration passed to the grantor for the conveyance, yet it was what he consented to receive, and a voluntary conveyance is at law sufficient to pass the estate. In equity, on the other hand, the grantee would be held to be a trustee for the grantor by reason of the failure of what was

really contemplated between the parties as a consideration." 1 Bish. Mar. Wom., section 600.

If the conveyance be to the sole and separate use of the married woman, there seems to be no difficulty in treating a debt contracted in the purchase as binding on the property, although not personally obligatory on the feme, because, where she takes possession under the conveyance, the debt is contracted for the benefit of her separate estate. It was so held in *Ballin* v. *Dillaye*, 37 N. Y., 35, 39, a decision of weight upon principle, the statutes of New York at that time, as the opinion shows, not having done away with the common law disability of a married woman to contract. See, also, *Yale* v. *Dederer*, 22 N. Y., 450. So, where the husband, or a third person, buys the land, and causes the conveyance to be made to the wife to her sole and separate use, there is no difficulty in enforcing against the land the vendor's lien for the unpaid purchase money. *Upshaw* v. *Hargrove*, 6 Sm. & M., 291; *Doyle* v. *Orr*, 51 Miss. 229. And all the cases agree that the contract between a married woman and a third person for the purchase by the former from the latter, is not void or voidable merely because the married woman is not bound. *Concord Bank* v. *Bellis*, 10 Cush., 276; *Catron* v. *Warren*, 1 Col., 358. At any rate, to use the language of Beck, J., in an Iowa case: "If it appears certain that a party contracting with a married woman will not suffer on account of her disability, as in the case where she has performed her obligation, or has done that which is the consideration for the promise of the other party,

or when the "consideration is secured to him." *Chamberlain* v. *Robertson*, 31 Iowa, 408, 414.

If, now, we have a married woman with money which she may use in purchasing land, an actual purchase and conveyance of the land to her sole and separate use, capacity in her to purchase and take by grant, and the consideration secured to the vendor without reference to the personal liability of the *feme*, we have, under the foregoing principles and decisions, all the elements of a valid trade. Her incapacity to execute valid notes, if we treat the purchase notes as void on that ground and because not expressly made obligatory on her separate estate, would not affect the vendor's right to subject the land to the satisfaction of the unpaid purchase money by virtue of the vendor's equity and of the lien reserved. By the delivery and acceptance of the deed of conveyance, the contract was executed and the title vested in her. She takes the title subject to the charge created by the terms of the deed. *Trezevant* v. *Bettis*, 1 Leg. Rep., 48; *Lee* v. *Newman*, 1 Memp. L. J., 139; *Eskridge* v. *Eskridge*, 51 Miss., 522.

Under such circumstances, the married woman is not entitled to have the cash payment refunded. In making the payment, as we have seen, she exercised a right which the law concedes. Having the money, she might dispose of it, even to her husband, with or without consideration. Her disability, this court has often said, is a shield to defend, not a sword with which to attack. There is not the least ground, in a court of equity, to rescind the purchase, and charge

the land with the money paid by her. All she can justly claim is exemption from personal liability.

The land is hers, subject to the payment of the purchase money by virtue of the vendor's lien, and as Crenshaw and Gordon agree that this money shall go to the original complainant Jackson, no difficulty arises out of the fact that the notes are invalid as notes. The same conclusion has been reached, and that too after decisions to the contrary, in a precisely similar case, by the Supreme Court of Mississippi, the clear and satisfactory opinion being delivered by Campbell, J. *Johnson* v. *Jones*, 51 Miss., 860.

One of the counsel for the married woman calls attention in his brief to the fact that the fund, part of which was used in paying for the land, was settled upon the *feme* by the decree, "subject to her disposition by last will and testament." But this settlement was made while the client was an infant, and was intended to enlarge her power, not to restrict it. After she came of age, upon privy examination by the Chancellor himself, and formal decree, the fund was paid directly to her, subject only to the settlement to her separate use, and to be invested in realty though not in the particular land.

The pleadings raise no question of the power of the *feme* over the fund, nor probably could any be made so long as the decree, under which it was paid to her, remained in full force.

There is no error in the Chancellor's decree, and the same will be affirmed with costs.

3L 684
6L 392
11L 573

T. A. GORDON *et als.* *v.* J. F. ENGLISH and N. HAYS.

1. GUARDIAN AND WARD. *Land purchased with Ward's money. Election to take land or money. Claim superior to Homestead right.* An infant, whose money has been used by the guardian in paying for land bought in his own name, may follow the money into the land, and elect to take the land, or have the money declared a charge upon the land, and the land sold for its satisfaction; and the infant's claim will be superior to the guardian's right of homestead in the land.

2. SAME. *Same. Priority of bona fide mortgagee. Pre-existing debt.* As between an infant, whose money has been used by the guardian in paying for land, and a *bona fide* mortgagee of the land, without notice of the infant's equity, for a consideration passing at the time, the mortgagee will have the better right, and will be entitled to the security even for a pre-existing debt included therein, if the new advance was made for the purpose of obtaining the additional security for the antecedent debt, and the new consideration forms a substantial part of the debt secured.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

W. H. McCALLUM for complainants.

T. M. JONES and N. SMITHSON for defendants.

COOPER, J., delivered the opinion of the court.

On the 21st of August, 1872, Jacob F. English bought, at a chancery sale of the lands of his father's estate, a tract of land containing one hundred and

sixty-five acres, at the price of $10,316.40, for which he gave his notes on time, and the sale was confirmed.

On the 18th of August, 1873, he was appointed guardian of his sister, Martha A., then and at the commencement of this suit a minor, who afterwards intermarried with T. A. Gordon. On the special bond given to cover the share of Martha A. in the proceeds of the sale of her father's land, the guardian gave as his sureties Samuel Yorkley, Jacob Yorkley, and M. E. Alexander. This share amounted to $2,276.99, which the guardian received and had the sum placed as a credit upon his notes for the land bought as above. He borrowed from N. Hays, at one time, $400, which he paid on the land, and afterwards $1,300, with which he made the last payment. When this last loan was made, on the 6th of January, 1876, he and his wife joined in a conveyance of the remaining one hundred and twenty-five acres of the land bought, he having previously sold off forty acres, in mortgage to Hays, to secure a note at two years with interest, for $2,033.44, given for the money thus borrowed and used, and for about $300 based on other considerations. On the 15th of August, 1877, this bill was filed by Gordon and wife and the sureties of English on his guardian bond, against English and Hays, seeking, upon the ground of the insolvency of English, to follow the funds of Gordon's wife into the land. Pending the litigation, the land was sold by consent and brought $4,033.35.

On the final hearing, the Chancellor was of opinion that complainants, by the frame of their bill, had

elected to take the land, and were entitled to share therein, and consequently in the proceeds of sale, in the proportion her money so invested bore to the residue of the purchase money, and it being agreed that this was one-fifth, he gave Gordon and wife a decree accordingly.

The Chancellor ordered Hays' debt to be paid in full, and the remainder of the proceeds of sale to be invested in a homestead for English and his family, he being the head of a family, and an actual occupant of the land before suit was brought. The complainants appealed.

The Chancellor's decree on the rights of complainants rests upon the conclusion that Gordon and wife, by the frame of their bill, had elected to take the land. In that view, the decree fixing the proportion of their interest was probably correct. *Gannaway* v. *Tarpley*, 1 Col., 572, 580. But he was clearly in error in his conclusion. The bill says that the complainants "are advised that they have the right to follow the funds of the said Martha A. Gordon into the land, which was paid for with those funds, and to subject it to sale for the payment of the amount due from him as guardian, at least to the extent that her estate was used in paying for it." They charge that the note given to Hays, and secured by mortgage of the land, was for a pre-existing debt in whole or in part, and say they are advised that they have the right to priority of satisfaction out of the land, or in any event that they are entitled to be paid ratably out of the proceeds of the land. The

sureties claim that, as their principal is insolvent, they may subject the property purchased with the assets of the ward to the payment of the liability incurred. The prayer of the bill is, that the court "decree a sale of said land for the satisfaction of the amount due complainants, Gordon and wife, and declare their right to priority of satisfaction over Hays; or if this cannot be done, that a decree be made allowing them to share ratably with him in the proceeds of sale." There is not only no election to take the land, but a distinct election to have satisfaction of "the amount due" them from the guardian out of the proceeds of the sale of the land, or, at any rate, such ratable part of the debt as they may be entitled to as between Gordon and wife and Hays. The bill states that the amount due from the guardian had been ascertained by a settlement of the guardianship, and asks that this amount, to the extent of the ward's funds invested in the land, be made a charge upon the land, and the land sold in satisfaction thereof. The decree in its main feature is, therefore, erroneous.

It is elaborately argued by the learned counsel of the defendants, and perhaps the Chancellor may have been misled by this view of the law, that the right of election of the ward was to take the land or the money; if the land, then the interest would be as tenant in common with the guardian in the proportion of the fund invested; if the money, then the demand would be personal against the guardian, and the land would belong to the guardian free from all claim of the ward. But this is a misconception of the rights

of the parties. No doubt, where the funds of a beneficiary have been used by the trustee in the purchase of land, if the beneficiary actually accept the money, with full knowledge of the facts, the land becomes the property of the trustee free from the trust. *Caplinger* v. *Stokes*, Meigs, 179. So, if the beneficiary take the land, the trust debt is extinguished. *Phillipps* v. *Terrell*, 10 Heis., 417. But if the beneficiary do not choose to take the land, and the money has not been paid, he may follow the money into the land by having it declared a charge thereon, and sold for its satisfaction.

The old cases actually limited the relief to this form, where the property was only partially paid for by the trust fund. Where a husband had invested the funds of his wife, together with his own funds, in land, and the contest was between the wife and the heir of the husband, Lord Eldon said: "One great question is, whether this estate belongs to the heir or the wife. The claim of the wife is put in this way: that personal property bound by the trust or obligation, whatever it is called, of this bond, is traced into the purchase of real estate, which estate must, therefore, be hers. But I do not know any case, in its circumstances sufficiently like this, to authorize me to hold that doctrine. I am prepared to say, that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property, that may be demanded out of the real estate, and that the estate is chargeable with it. But it was not so purchased with it, that the estate

should be declared to belong, not to the heirs, but to the wife." *Lewis* v. *Madocks*, 17 Ves., 48, 57. To the same effect are *Lane* v. *Dighton*, Amb., 409; *Lench* v. *Lench*, 10 Ves., 511; *Savage* v. *Carroll*, 1 Ball & B., 265, 285. Some of the American cases are in accord. *Wallace* v. *McCullough*, 1 Rich. Ch., 426; *Wallace* v. *Duffield*, 2 Ser. & R., 521. And no doubt the principle would yet be applied in proper cases. But the beneficiary may, as a general rule, elect to take the land or the money, and use his hold on the land as a means of getting his money; or, in other words, the beneficiary has a lien on the land, with a right to a decree for a sale to reimburse the trust fund, and may hold the trustee responsible if there is a loss on the sale. Perry on Trusts, sec. 128; W. & T. Lead. Cases Eq., 341, 342, (4th Amer. ed.)

In this class of cases, our decisions are, that the ward, whose money has been used, may, irrespective of the point of time at which the title passed to the guardian, claim the land against all persons except *bona fide* purchasers for value. *Gannaway* v. *Tarpley*, 1 Col., 580; *McCall* v. *Flippin*, 2 Baxt., 161, note; *Snell* v. *Elam*, 2 Heis., 82; *Turner* v. *Petigrew*, 6 Hum., 438. If the title does not actually pass to the beneficiary by way of resulting trust, he is the equitable owner of the property, and the Chancery Court will decree it to him, or subject it to the satisfaction of his demand as he may elect.

The nominal purchaser has a mere naked legal title subject to the trust. He is precisely in the attitude of a purchaser of land, in those States which consider

a mortgage as a mere security, who has taken the title, and at the same time re-conveyed in mortgage to secure the purchase money. He cannot acquire a homestead right as against the person whose money has been used. The money due the beneficiary is in reality purchase money, against which the homestead exemption cannot prevail, whether there be a statute to that effect or not. Thomp. Homest., section 330. The law has been so declared in the case of a resulting trust proper. *Shepherd* v. *White*, 11 Texas, 354. And it must be the same with a trust which has all the qualities and effects of a resulting trust proper. The Chancellor erred in holding otherwise.

Gordon and wife concede the priority of Hays to the extent of the advance when the mortgage was made, but claim the prior right as to the residue of Hays' debt, which was pre-existent at the date of the mortgage. The right of the beneficiary is superior to that of creditors merely claiming under an assignment made to secure existing debts. *Turner* v. *Petigrew*, 6 Hum., 438. If, however, an assignment is made to secure money advanced at the time without notice of the equity, it is conceded that the creditor would have the better right, for he is *pro-tanto* a purchaser. *White* v. *Hussey*, Prec. Ch., 13; *Lister* v. *Turner*, 5 Hare, 281; *Bass* v. *Wheless*, 2 Tenn. Ch., 531. The record shows that Hays made the last advance in consideration of the mortgage being made to cover the previous indebtedness. The rule in such cases is, that the payment of a substantial consideration at the time will render the mortgagee a purchaser for value, and the

presumption, in the absence of proof, is that the mortgagee made the new advance for the purpose of obtaining the additional security for the antecedent debt. *Baggarly* v. *Gaither*, 2 Jones' Eq., 80; *Gliddon* v. *Hunt*, 24 Pick., 221; *Percival* v. *Frampton*, 2 Crompt., M. & R., 180; *Finnegan* v. *Finnegan*, 3 Tenn. Ch., 510.

The reason is, that the mortgagee is a *bona fide* purchaser by the new consideration, and his rights as such should not be affected by the fact that he was induced to make the advance in order to secure the pre-existing debt. It is enough that the new consideration constitutes a substantial part of the debt secured. The exception of English to so much of the deposition of Hays as relates to this subject is clearly not well taken, and was properly overruled. Besides, as against English, the claim of Hays is good, and so conceded to be *in toto*.

There is proof in the record tending to show that this suit is really the suit of the sureties, using the names of Gordon and wife by permission. There is also proof that on the next day after the execution of the mortgage to Hays, English and his wife joined in a conveyance of the same land in trust to indemnify the sureties on the guardian bond from loss thereby, but recognizing the prior right of Hays under his mortgage. No motion was made based on the first disclosure, nor is the fact noticed in any pleading or decree. The defendant Hays does mention the execution of the trust assignment in his answer, and insist that the sureties were estopped, by their acceptance of it, to dispute his priority, and the Chancellor so held.

But our conclusion that Hays is entitled to priority of satisfaction for his entire debt over Gordon and wife, through whom alone the sureties can obtain any benefit under this bill, renders it unnecessary to consider the question of estoppel. The pleadings raise no question as to the renunciation by the sureties of their rights under the trust conveyance by the filing of their bill. That point can only come up when they seek to enforce the trust. This part of the Chancellor's decree will be reversed.

The result is, that the entire mortgage debt of Hays must first be paid out of the proceeds of the sale of the land, then the balance due to Gordon and wife. Any surplus will go to English. The decree below not being altered so far as Hayes in concerned, and English being insolvent, the complainants will pay the costs of this court. The costs of the Chancery Court will go as decreed below.

SL 643
4pl 407

RICHARD DOUGHERTY *v.* F. R. KELLUM.

1. LANDLORD AND TENANT. *Rent. Supplies.* A landlord, in a suit to enforce his lien on the tenant's crop, may join demands for rent and supplies which are a lien on the same crop, but he must give the amount of each demand constituting the aggregate sum sued for.

2. SAME. *Attachment. Affidavit.* It is no ground for quashing the attachment in such case, that the affidavit fails to specify the form of the demand, whether note or account, nor that the amount of the debt claimed is qualified by the words "more or less."

3. SAME. *Same. Same.* But the affidavit on which an attachment is sought for supplies furnished by the landlord, must state that an account of those supplies was kept as the articles were furnished, and the account must be sworn to before or at the time of suing out the attachment. Any note or written memorandum, even on a loose sheet of paper, if made at the time the articles were furnished, would meet the requirements of the act.

4. SAME. *Same. Costs when judgment is rendered on summons, and attachment is bad.* The judgment rendered on the service of a warrant or summons may be good, although the attachment may be quashed for fatal defects, in which case the costs of the recovery and the costs of the attachment will be severally borne by the unsuccessful party.

FROM GILES.

Appeal from the Circuit Court of Giles county. W. S. MCLEMORE, J.

JONES & EWING for Dougherty.

N. SMITHSON for Kellum.

COOPER, J., delivered the opinion of the court.

Kellum sued Dougherty before a justice for rent of land and supplies, by summons and original attachment, based on a landlord's lien. The summons was served on the defendant and the attachment levied on the defendant's crop, and both writs returned on the same day for trial. The justice gave judgment in favor of the plaintiff for $22.23, and the defendant appealed. In the Circuit Court, the jury found a verdict in favor of the plaintiff for $20.26, and the defendant appealed in error to this court.

By the Code, section 3539, any debt created for the rent of land is made a lien on the crop raised on the land, which lien, by section 3541, may be enforced by original attachment issued on affidavit that the rent is due and unpaid. By the act of 1875, ch. 116, sec. 1, a landlord is given a further lien on growing crops for necessary supplies of food and clothing furnished tenants for themselves, or those dependent on them, by the landlord or his agent, to enable the tenant to make the crop; "*provided*, an account of such necessary supplies is kept as the articles are furnished, and is sworn to before some justice of the peace before the enforcement of the lien." Section 2 is: "That this lien may be enforced as the landlord's lien for rent; *provided*, always, that the affidavit, as above provided for, shall be made as to the truth and justice of the account, before the magistrate or clerk of the court shall issue writs of distraint or attachment."

The affidavit, on which the attachment issued, states that defendant is justly indebted to the plaintiff in the sum of fifty-five dollars, "more or less," and that the debt was created "for rent and supplies furnished for the year 1877," and is due and unpaid. In the Circuit Court, the defendant moved to quash the attachment, because the affidavit did not state the amount of the supposed debt, nor show whether the demand was due by note or account, and because the account for supplies was not sworn to before the attachment was sued out as required by the act of 1875. It is now assigned as error, that the court below overruled this motion.

In the early history of this State, the courts adopted the policy of construing the attachment laws with great strictness, as departures from the common law modes of procedure. But this course was changed, in deference to the legislative branch of the government, with whom the proceeding by attachment was a favorite remedy, and by whom the law had been changed as often as the remedy was limited by the strict construction of the courts. *Runyan* v. *Morgan*, 7 Hum., 210. Afterwards, it was expressly provided by the Code, section 3477: "The attachment law shall be liberally construed, and the plaintiff before, or during trial, shall be permitted to amend any defect of form in the affidavit, bond, attachment, or other procedings." If this be the legislative will in reference to original attachments which may be sued out without actual notice to the defendant, it is obvious that the courts would feel less reluctance in yielding to it where the

attachment is accompanied by actual notice. The lien given to the landlord on the growing crop of his tenant for rent and supplies, which may be enforced by attachment, takes the place of the common law remedy by distraint. The legislation which gives it and regulates its enforcement, is beneficial both to the landlord and the tenant. For it enables the landlord to assist the tenant without too great a risk of loss, and secures the better cultivation of the soil. And the tenant, being on the land, and a citizen of the locality, has prompt notice of the legal proceeding taken to enforce the lien.

Inasmuch as the debt for rent, for which a lien is given by the Code, section 3539, may be "by note, account or otherwise," and as the debt for supplies, for which a lien is given by the act of 1875, may be by account, it is manifestly not important that the affidavit for the attachment should specify the form of the demand, whether note or account. So, too, the amount due for rent and supplies may be often uncertain by reason of payments and counter claims, and the statement of an exact sum would be impossible. In this view, the addition of the words "more or less" to the statement of the amount of the debt in the affidavit before us may, perhaps, be taken as equivalent to saying "about" that sum. The plaintiff would not obtain a lien on the property attached for more than the sum mentioned and a few dollars for *bona fide* errors, and he would, probably, be liable in damages for a willful misstatement of his demand in excess of the real amount, by which a larger quantum of the

crop had been impounded than the real debt justified.

But the last ground for the motion to quash, namely, that the account for supplies was not sworn to before the attachment was sued out, seems to have been well taken. It was manifestly the intention of the Legislature, while securing the landlord, to protect the tenant. The act of 1875 expressly provides, in both of its sections, that the account for supplies shall be sworn to before the issuance of the writ of attachment, and gives the lien in the first section for supplies only where an account of such supplies has been kept "as the articles are furnished." The affidavit should aver the fact that an account of the necessary supplies was kept as the articles were furnished, and that account must be sworn to before, or at the time of suing out the attachment. No doubt, the same liberal construction would apply to such accounts as was given to the "book of accounts" under the old act of 1756, ch. 4, brought into the Code, section 3781, *et sequente.* Any note or written memorandum, even on a loose sheet of paper, if made at the time the articles are furnished, would meet the requirements of the act. *Irwin* v. *Jordan*, 7 Hum., 167.

No objection has been made to the affidavit in this case, that it does not distinguish between the rent and supplies, but covers them both in one charge. We think it clear, however, that while a demand for rent and supplies may well be joined in the same suit to enforce the landlord's lien where they are a lien on the same crop, yet the affidavit must distinguish

between them, and give the amount of each claim which constitutes the aggregate demand. The attachment is, therefore, fatally defective for the reasons stated, and should have been, and must now be quashed.

There is no reason, however, for interfering with the verdict of the jury and the judgment rendered thereon. The defendant was regularly summoned to answer the plaintiff's demand, and has had a fair trial upon a correct charge. No exception has been taken to the judgment in the argument submitted on behalf of the appellant.

The attachment will be quashed, and the appellee charged with all the costs incident to the attachment, and the judgment for the recovery of the debt found by the jury affirmed with the costs incident to that branch of the suit.

3L 649
16L 251

THE STATE v. C. T. MASON, Mayor of Pulaski.

1. STATE TAX. *Trials by Mayor or Recorder.* Upon trials on warrants issued by a Mayor or Recorder for a violation of a town ordinance, the State is not entitled to the tax of $2.

2. SAME. *Same.* Warrants issued by a Mayor or Recorder to recover penalties for violation of the ordinances of a town, are not State prosecutions, nor is such a trial a bar to a prosecution for an offense against the laws of the State committed by the same act.

FROM GILES.

Appeal in error from the Circuit Court of Giles county. W. S. MCLEMORE, J.

Z. M. EWING for the State.

N. SMITHSON for Mason.

DEADERICK, C. J., delivered the opinion of the court.

On the 25th of November, 1879, a motion was entered in the Circuit Court of Giles county, by the State against defendant, as Mayor of Pulaski, for failure to assess, collect, account for, or pay over, the revenue due the State upon law suits tried before him as Mayor of Pulaski, amounting to $14. A list of cases, seven in number, it is agreed had been tried before the Mayor, in which cases the State claimed a tax of $2 to each, on the ground that said costs were "criminal cases," under section 553*a*, sub-sec. 78, of

T. & S.'s Addenda to Code, being the act of 1871, ch. 62, sec. 1.

That sub-section provides that in all criminal causes before any mayor or recorder's court in this State, the defendant, or the party taxed with the costs, shall pay a State tax of two dollars, to be collected," etc., as in cases of justices of the peace, sheriffs and constables, under the preceding section.

The preceding section referred to, is sub-section 77, and provides that a State tax of two dollars be imposed "in all criminal cases submitted, under the small offense law, before a justice of the peace.

Both sections probably referred only to such criminal cases as were submitted under the small offense law, and sub-section 78 was intended to confer on mayors and recorders, who had jurisdiction with justices of the peace of such offenses, the same power to take submissions, etc., exercised by justices of the peace.

And it was not the intention of the Legislature to impose a tax of two dollars upon all cases tried by a mayor or recorder, having such jurisdiction, while in cases before a justice of the peace such a tax was imposed only in cases of submission.

But however this may be, the acts cited contemplate offenses which are prosecuted as violation of the laws of the State, as contradistinguished from penalties imposed for violations of municipal ordinances, imposed, not by an officer of the State, but by an officer of such municipality.

In this case it appears from the facts agreed on, that the parties were arrested upon warrants issued by

the mayor for offenses against the by-laws and ordinances of the town of Pulaski, and were so issued by him as mayor and not as an officer of the State, and were tried by him as mayor, for offenses against the ordinances of said town only, and not for any violation of the State's laws.

The Circuit Judge held that the mayor was not liable on the motion, and the State appealed.

No State tax was assessed or collected in either of the cases. The warrants issued by the mayor to recover penalties for violations of the ordinances of the town, are not State prosecutions for crime, as has been several times held by this court in unreported cases, nor does such a proceeding to recover a fine, tried upon the mayor or recorder's warrant for violation of a town ordinance, form a bar to a prosecution for an offense against the laws of the State, committed by the same act.

There is no error in dismissing the motion, and the judgment is affirmed.

THOMAS LANCASTER *v.* THE STATE.

1. COSTS. *Clerk's Fees.* The clerk is not entitled to pay for "an order for *capias* to issue." The law makes it his duty to issue a *capias* upon the return of an indictment or presentment, if the defendant is not in custody.

2. The clerk is entitled to only one fee "for presentment or indictment, charging prisoners and pleas."

3. SAME. *Witness Fees.* The clerk will not tax the attendance or mileage of any State witnesses who do not prove their attendance in *open* court by oath, that he has not directly or indirectly procured himself to be summoned, that he was legally summoned on behalf of the State, and has verily attended the number of days claimed.

4. The attendance of witnesses not legally summoned, cannot be taxed.

FROM DEKALB.

Appeal in error from the Circuit Court of DeKalb county. N. W. MCCONNELL, J.

T. J. FISHER for Lancaster.

JOHN FRIZZELL for the State.

MCFARLAND, J., delivered the opinion of the court.

Lancaster was convicted of gaming and adjudged to pay a fine and costs, which he secured. He afterwards, at the next term of the court, moved to correct the taxation of the costs, specifying in his motion the items complained of. The motion was in part sustained, but in other respects overruled. He alone has appealed.

His first objection is to the costs taxed in favor of the clerk. The items objected to were stricken out by the Circuit Judge, except the following, to-wit: "Order for capias, 25 cents; two securities of record, 50 cents; plea and charge, 25 cents, and order staying *fi. fa.*, 25 cents." There being no appeal by the State or clerk as to the items stricken out, we confine our attention to the items specified in the motion which the court refused to strike out.

1st. Order for capias, 25 cents. The clerk added to the entry upon the minutes, showing the return of the presentment, an order for *capias* to issue, and for this charges the fee. The order was unnecessary, as the law makes it the duty of the clerk to issue a *capias* upon the return of a presentment, if the defendant is not in custody. Code, section 5103. But the order appears upon the minutes of the court, and must be presumed to have been made by the order of the judge, and in this view may be allowed.

The second item is for two securities of record, 50 cents. This seems to be within the letter of the fee-bill, sections 4551 and 4560.

The third item is for "plea and charge," 25 cents. Sub-section 2 of section 4560, allows for presentment or indictment charging prisoners and pleas, 25 cents. The clerk charges for presentment 25 cents, and for plea and charge, 25 cents. We think but one fee is allowed, not two of 25 cents each.

4th. Order staying execution by consent, 25 cents. This, although embraced in the same entry as part of the final judgment, is an addition thereto not contem-

plated by law as part of the final judgment, and the clerk is entitled to pay therefor as an additional order.

It seems that in some instances, clerks have been in the habit of "dividing" one entry of record so as to charge several fees for it, as for a judgment, order, rule, motion, etc., etc. The practice is not to be approved, perhaps, to the extent it is sometimes carried, but in this case the Circuit Judge sustained the defendant's motion except as to the items specified, and as to these we think we are authorized to strike out only the one indicated.

2d. The defendant moved the court to strike out the attendance of the State's witnesses, including their mileage and turnpike fees, upon the ground they had not proved their attendance before the clerk, as required by law. On this motion, the clerk certifies that he had not sworn the witnesses, but merely took their statement as to the time they had attended, mileage, etc., and taxed their costs accordingly. The Circuit Judge overruled this motion, and we think erroneously.

The Code, section 5394, provides that the witness on the part of the State "shall prove his attendance in open court by *oath* before the clerk, that he *has not directly or indirectly procured himself to be summoned* as a witness, that he was legally summoned on behalf of the State, and has verily attended the court as a witness the number of days claimed."

This is a plain, direct and positive statute, and the failure to enforce it, opens such a wide door for fraud and speculation upon the State and counties, that it

seems to us that there is every reason for its rigid enforcement, especially when the point is made directly and at the proper time. That in this particular instance the costs may be paid by the defendant, does not alter the case. Possibly a failure to observe the positive requirements of this statute may account, in some instances, for the unreasonable bills of costs against the State and counties.

Again, in addition to this objection to all the State's witnesses, the defendant objected to the costs of certain witnesses specified, upon the ground that they were not legally summoned. The facts were shown to be, that one Johnson was the principal witness for the State; an attack upon his character was apprehended; he procured from the clerk a blank subpœna, and when he found a witness who would sustain him, he inserted his name and summoned him. He returned the subpœna executed, and signed his name as "D. Sh'ff." He admitted that he was not an officer, and had not been deputized by any one. The Circuit Judge allowed the witnesses thus summoned *one day's* attendance.

Witnesses who attended without being lawfully summoned, cannot be taxed to the opposite party. *Watson* v. *Waterhead*, 2 Yer., 230. It is clear these witnesses were not lawfully summoned, and we do not find any statute giving the Circuit Judge any discretion.

The point was also made, that part of the State's witnesses were not examined, and the defendant had no witnesses summoned, although he examined witness as to character, but as upon the first point the

attendance of all the witnesses is for the present stricken out, it is unnecessary to decide that point.

The judgment of the Circuit Court will be reversed upon the points indicated.

3L 656
6L 329

NANNIE MOORE, by next friend, *v.* J. A. WALKER *et als.*

1. MORTGAGEE. *Valuable consideration. Purchaser for value.* A mortgagee for a valuable consideration passing at the time is, to the extent of the consideration, a purchaser for value.

2. CONVEYANCE. *Voluntary.* A person *sui juris* conveyed his property by voluntary deed to his mother, upon a recital that his habits were such as to disqualify him from managing his property in a prudent and discreet manner, and that the income was sufficient for his support, in trust to permit him to receive the annual income arising therefrom during his life, and at his death the same to be at the absolute disposal of his mother, "or to those who would be entitled to the same under the statute of distributions from her." Some years afterwards, the mother on her death-bed re-conveyed the property to her son. Held, that he took a good title.

3. GRANTOR. *Weakness of body and mind. Undue advantage. Innocent purchaser will be protected. When.* If a grantor have sufficient capacity to make a conveyance of property, and only undue advantage be taken of his weakness of body and mind, a subsequent innocent purchaser from the grantee, after the lapse of twelve years without any steps taken by those interested to set aside the conveyance, would acquire the legal title, and a superior equity to the equity of the aggrieved parties.

4. INNOCENT PURCHASER. *Notice.* Language in a deed which admits of a construction consistent with the title, will not be notice to an innocent purchaser of an outstanding equity.

5. MARRIED WOMEN. *Right of Action. Statutes of Limitation.* Under the act of 1850, ch. 36, brought into the Code, sec. 2481, a wife who married before the passage of the act, became entitled to sue for and recover in her own name in equity her land of which she and her husband had been previously disseized by a third person, but not for the time required to create the bar of the statute of limitations against the joint right of action of the husband and wife, and the separate right of action thus given by the statute would not be barred during the coverture.

FROM MAURY.

Appeal from the Chancery Court at Columbia. W. S. FLEMING, Ch.

W. S. RAINEY, N. R. WILKES and A. L. DEMOSS for complainants.

BARNETT & HUGHES for defendants.

COOPER, J., delivered the opinion of the court.

Nannie Moore, the wife of W. F. Moore, files this bill by next friend, claiming title to a tract of land conveyed by her husband to John A. Walker in mortgage to secure the price of a stock of goods. The mortgage deed was executed on the 20th of June, 1871, and, on the 20th July, 1874, the mortgagee, on bill filed for the purpose, had obtained a decree for the sale of the land in satisfaction of the debt, when the wife enjoined the sale by the original bill in this cause. That bill, filed on the 14th of November, 1874, set up title to the land by way of resulting or con-

structive trust. The amended bill, filed on the 6th of September, 1875, claimed direct title to one-third of the land. The Chancellor dismissed the bill, but without prejudice to the wife's right to the one-third of the land under the last claim, which right he was of opinion could only be asserted after the husband's death. The complainant appealed.

To determine in whom is the legal title to this land, it becomes necessary to trace a curious family history. About the year 1824, Solomon Herrin, who had owned the land from 1811, died, leaving a will by which he directed the balance of his personal and real estate to remain in the hands of his wife, Nancy, until his son Robert came of age, when, if his wife continued a widow, the estate was to be equally divided between her and the son, and at her death or if she should marry, he devised the entire estate to the son. The widow married L. B. Boyd shortly after her first husband's death, and had by him three children, in the order named, Laird B. Boyd, John R. Boyd and Nannie Boyd, the last being the present complainant. John R. Boyd was born in 1829, and Nannie Boyd in 1832. Robert Herrin, the testator's son, died on the 13th of July, 1834, being then about two months over twenty-one years of age. Boyd and wife went on the tract of land in controversy a year after Robert Herrin's death, and continued to occupy it until Boyd died, in 1840 or 1841. Nancy Boyd, his widow, then assumed control. Laird B. Boyd, her eldest son, in his deposition in this case, says: "Our family understood the land to be the property of our

mother. She claimed it as her own, as the heir of Robert. She gave the land to John R. Boyd, making him a deed, who took possession about the time he came of age. After I came of age, I traded my interest in the land to John, and gave him a deed therefor." Nancy Boyd continued to live on the place until 1855, when she moved to Nashville, where she died on the 2d of September, 1858. Nannie, her daughter, intermarried with W. F. Moore on the 4th of January, 1848. Moore and wife lived on the land a few years, the precise date not given, and then moved to another place. John R. Boyd died in March, 1860, and Moore and wife returned to the place, and resided there until the improvements were burned, after the war. They have since resided on an adjoining farm, the property of the husband.

After John R. Boyd took possession of the land, the following conveyances were made and registered: John R. Boyd to Nancy Boyd, December 13th, 1850. Nancy Boyd to John R. Boyd, September 2, 1858. John R. Boyd to W. F. Moore, March 10, 1860. Laird B. Boyd to W. F. Moore, December 15, 1860.

The paper title seems to be in Moore, the husband, but the several conveyances contain peculiar features. Upon these peculiarities the claim of the complainant is in part rested.

John R. Boyd became at an early age addicted to the excessive use of spirituous liquors; he drank by spells, during which the appetite was uncontrollable, and he became utterly wild and reckless, and at times dangerous. In the intervals of these spells he was

intelligent and sensible, although, during the last two or three years of his life, greatly enfeebled both in body and mind. His deed to his mother of the 13th of December, 1850, is for the nominal consideration of five dollars, and conveys not only the land but in addition eight slaves, all his property in fact except some litle reserved for the payment of his debts. It recites that his habits are such as to disqualify him from managing his property in a prudent and discreet manner; that he frequently contracted debts improvidently, and that the income of his property was sufficient for his support. Now, therefore, it says, this deed is made for the following uses and trusts, and for no other purpose whatever. First, for the payment of his debts, if the property retained be insufficient for the purpose. "Then the said Nancy is to hold the property conveyed in trust to permit me to receive the annual income arising therefrom during my life, and at my death the same is to be at the absolute disposal of the said Nancy Boyd, my mother, or to those who would be entitled to the same under the statute of distributions from her."

The re-conveyance of Nancy Boyd to John R. Boyd is upon the nominal consideration of five dollars. The deed of John R. Boyd to W. F. Moore is in consideration of love and affection and of various sums of money paid by the latter for the former. The deed from Laird B. Boyd to W. F. Moore recites a consideration of $4,000 paid, and binds the grantor to warrant the title of "said land or so much thereof as I, the said Laird Boyd, am entitled to as heir of

my brother, John Boyd, as under a deed made by him to his said mother, to which reference is had, against the claims of all persons whatever. I also release to the said Moore all claim I have in and to said land, and every part thereof, for the consideration aforesaid. But I bind myself for only that portion of said land which I would be entitled to as aforesaid, being one-half, the wife of said Moore being entitled to the other half, if he is not entitled to the whole by the conveyance under which he now holds and claims the entire tract." The original bill claimed that complainant was entitled to one undivided half of the land in controversy, by virtue of the trust conveyance of the 13th of December, 1850, by John R. Boyd to his mother, upon the ground that the re-conveyance by the mother to the son was *ultra vires* and void, and, consequently, the son could make no valid title to the husband. The bill also claimed that if the re-conveyance of the mother to the son was good, the subsequent deed from the son to the husband was void for want of capacity in the son to make it. It was also claimed that the consideration of various payments was fictitious, and the love and affection for complainant, not for the husband. In either event, as both the mother and son died intestate, the complainant would inherit one-half of the land as heir.

The conveyance of the 13th of December, 1850, is a very curious instrument. If it was simply a mode adopted to give the grantor the beneficial use of the property, he being the only *cestui que trust*, and the grantee taking only such title as was necessary to

would construe the language as meaning anything more than a reference to the deed to the mother, and that Laird and complainant were the heirs of John, and entitled each to one-half of the property as such, unless John had validly conveyed the land to Moore. Certainly after the lapse of twelve years, a purchaser might well consider Moore's title good to the entire tract.

There is some evidence in the record tending to show that Nancy Moore, at the date of the deed of re-conveyance to her son, was incapable of making the deed. The instrument bears date the 2d of September, 1858, and she died on the next day. She seems to have died of typhoid fever, and on the day preceding her death was so enfeebled as to induce some of the witnesses who then visited her, not to disturb her. But the same evidence shows that when aroused, she recognized her acquaintances. The deed was written by her own brother, who, so far as appears, had no interest in the matter, and was attested and proved by two of her neighbors, and registered shortly thereafter. Neither of the bills makes any contest over this deed, or states any facts upon which its validity can be impeached. And even if any advantage was taken of the weakness of the grantor, that fact, as we have seen, would not affect the title of an innocent purchaser after the lapse of twelve years.

A mortgage upon a valuable consideration passing at the time is, it need scarcely be added, *pro tanto* a sale. To the extent of the consideration, the mortgagee is a purchaser for value. *Mills* v. *Banks*, 3

P. W., 9; *Williams* v. *Woodard*, 2 Wend., 478; *Hoggatt* v. *White*, 2 Swan, 268; *Bass* v. *Wheless*, 2 Tenn. Ch., 531. The defendant Walker, unless the recitals of the registered conveyance gave him notice, is a *bona fide* purchaser for value to the amount of his debt, without notice. He relies on, and is entitled to the benefit of this defense, so far as the complainant's claim is made to rest on the conveyances under consideration. There is no ground for the assumption that a resulting trust was created in favor of the complainant at the passing of the title by these conveyances. But even a resulting trust, and, *a fortiori*, a constructive trust, must yield to the equity of a *bona fide* purchaser for value, without notice, who has the legal title. *Sandford* v. *Weeden*, 2 Heis., 71, 81; *Turner* v. *Petigrew*, 6 Hum., 438; *Bass* v. *Wheless*, 2 Tenn. Ch., 531.

But the title of the complainant to one-third of the land as heir of her half brother, Robert Herrin, is, upon the facts of this record, superior to the title of the defendant Walker. She has never parted with that interest, nor has the statute of limitations operated to bar her right. She was a member of her mother's family during infancy, and therefore living with her on the land. It is the settled law of this State, that where the possession of property is mixed and concurrent, the legal seizin is in the person who has the estate, even in the case of parent and child. *Fancher* v. *DeMontegre*, 1 Head, 40; *Stewart* v. *Harris*, 9 Hum., 716; *Knight* v. *Jordan*, 6 Hum., 101; *Hurd* v. *French*, 2 Tenn. Ch., 355. The statute of limitations did not,

therefore, commence to run against complainant until after her marriage, and she has since been under the disability of coverture. It is very probable that the adverse possession only commenced after her brother, John R. Boyd, took actual possession under the deeds of his mother and elder brother, which was probably subsequent to the 10th of January, 1850, when the act of 1850, ch. 36, brought into the Code, sec. 2481, was passed.

And whether this was so or not, it is certain that the bar of the statute had not operated when that act went into effect. Previously thereto, it had been repeatedly held that a husband by marriage became jointly seized with his wife of a freehold estate in her land; that a disseizin during coverture is a disseizin of the joint estate, and the husband and wife must jointly sue to recover possession; and, on failure, that the joint right of action would be barred by seven years' adverse possession. *Guion* v. *Anderson*, 8 Hum., 325; *Weisenger* v. *Murphy*, 2 Head, 676; *McClung* v. *Sneed*, 3 Head, 222; *Murdock* v. *Johnson*, 7 Col., 605. In the last case cited, upon an application for re-hearing, the question was reserved whether the wife, although she could not sue alone at law, might not maintain a bill in equity to set up her rights, even if not entitled to possession until the husband's death. This question has since been resolved in favor of the right. *Dodd* v. *Benthal*, 4 Heis., 601. And where the disseizin occurred after the passage of the act of 1850, it has been held that the wife may, by bill in equity, recover possession of the property at once.

McCallum v. *Petigrew*, 10 Heis., 394. The decison is put upon the ground that, by a fair construction of the statute, the intent of which is that the wife shall not, by any act of her husband, be deprived of the possession of her land, the right is secured to the wife to prosecute a separate action to recover possession. As to this separate right of action, the statute of limitation does not run during coverture, and the wife may, therefore, sue at any time without waiting until the husband's death. The principle upon which the decision rests, must equally apply where the disseizin took place before the act was passed, if the right of the disseizor had not become perfected by the lapse of the statutory bar before its passage. For, the subsequent neglect of the husband to resort to the joint right of action of husband and wife, would not affect the separate right of action of the wife secured by the statute. *Cantrell* v. *County of Davidson*, 3 Tenn. Ch., 428.

The Chancellor's decree will be modified in this regard, and in other respects affirmed. The costs of this court will be paid by the defendant Walker.

W. P. STOCKARD *v.* J. M. GRANBERRY *et al.* and J. M. GRANBERRY *v.* W. P. STOCKARD *et al.*

1. SURETIES. *Not discharged by agreement for delay after judgment.* After judgment an agreement between creditor and principal for delay, even for a valuable consideration, will not discharge sureties, for the sureties may have judgment over against the principal, and proceed to make the money, notwithstanding the agreement between the creditor and principal.

2. SAME. *Are discharged when creditor obstructs their remedy.* But if, after judgment and issuance of execution, the creditor takes a deed of trust from the principal on his property, and includes other debts due him and other persons, to be paid before the judgment, the sureties will be discharged, for thereby he covers up the property of the principal and obstructs the remedy of the sureties.

3. STAYOR. *Entitled to same defense as sureties.* A stayor is a surety for the payment of the judgment, and is entitled to the same defenses as the sureties.

FROM MAURY.

Appeal from the Chancery Court at Columbia. W. S. FLEMING, Ch.

E. C. MCDOWELL and A. L. DEMOSS for Stockard.

BARNETT & HUGHES for Granberry.

DEADERICK, C. J., delivered the opinion of the court.

In 1860 Granberry recovered, before a justice of the peace of Maury county, fourteen judgments, aggregating something upward of six thousand dollars, against A. J., G. W. and L. J. Polk. Complainant Stock-

ard became stayor of these judgments. In May, 1861, executions were issued upon them, but returned unsatisfied, probably by order of Granberry. On May 22, 1865, alias executions were issued upon said judgments and placed in the hands of deputy sheriff Ricketts for collection. Within ten days thereafter the deputy sheriff saw the Polks and informed them he would levy on their property as he was instructed to do by Granberry. It was proposed by the Polks or Granberry to execute a deed of trust to secure the debts. This proposition was accepted, and a few days thereafter two deeds of trust were executed, one by G. W. Polk and the other by L. J. Polk, to James H. Thomas, trustee, A. J. Polk having become insolvent; the deputy sheriff surrendered the executions to Granberry, and his costs were assumed by the Polks.

The deed of L. J. Polk provided for one-half of the fourteen judgments, and that of G. W. for the other half. Upon closing said trusts the half secured by Lucius J.'s deed was fully paid. That half included in said G. W. Polk's deed was not paid, nor any part thereof.

In 1872 Stockard filed his bill to enjoin the sale of his land, upon which Granberry had had *pluries* executions issued and levied, and returned for condemnation to the circuit court. He claims to be released from liability on said judgments on the ground that Granberry had not acted in good faith in ordering the return of the executions and procuring from the Polks a conveyance of all their property in trust to secure other debts, besides the fourteen judgments, due to him-

self and others; and that said trust deed of G. W. Polk as to one-half of said judgments postponed them to other large debts, and nothing was realized to be applied to them.

As no question of practical importance arises upon the deed executed by L. J. Polk, it is needless to further consider its provisions, except to say it secured other debts than the half of said judgments.

In regard to the deed of G. W. Polk, it conveyed all his real estate except, as he stated on his examination as a witness, a small tract of land of comparatively small value in Dyer county, Tennessee, and a tract of land in Arkansas. It also conveyed, as we infer, all his personal estate, including knives and forks, etc. So that while he had a very valuable real and personal estate in Maury county up to the time of the execution of his trust deed, subject to execution at law, after that he had no property in said county which could be reached by execution. The first debts secured are fourteen judgments due Granberry, and recovered in January, 1861, each for from $469 to $475. The next are notes and claims of the Bank of Tennessee, number and amounts not given, upon which his brother, Lucius J., is security. The next claim to be paid is a note to Andrew Erwin, guardian, for $5,000; the next is a debt to Isaac H. Hilliard, in the sum of $15,000; the next is a debt to James J. Bryant, of about $1,200; the next is a medical bill to complainant, Stockard, amount not given. Then follows, as the 7th in the order of payment to be made, the one-half of the said fourteen judgments due

Granberry. The next claim is a note to S. W. Fitzpatrick for about $3,500; then a note to Morgan Fitzpatrick for about $4,200. Then follows the last of his debts mentioned and intended to be secured, evidenced by three notes, aggregating about $680, and due to James Aiken.

The deed provides that if said George W. shall pay the foregoing debts on the first of June, 1866, the trustee shall reconvey the same, and stipulates that the property shall remain in the grantor's possession until it is necessary to sell the same, unless the trustee should think it best for those interested that he should take possession of the same. The debts were to be paid in the order named, from which it will appear that a large amount was preferred to the half of the fourteen judgments therein mentioned.

Granberry filed a cross-bill seeking to have Stockard's land, consisting of a house and lot of several acres, sold for the satisfaction of the unpaid half of the said fourteen judgments. The pluries executions had been issued and levied upon said house and lot in 1870. The said executions had been returned to the circuit court for condemnation of the land, and the same were still pending when the original bill was filed in this case.

Stockard answered Granberry's cross-bill, insisting he should not be held liable, avering, as he had done in his bill, that the executions in the hands of Ricketts, deputy sheriff, had been placed there by Granberry with instructions to make the money; that he was so informed by Granberry while Ricketts had the

executions in his hands, and he had no information or knowledge of a return of said executions without levy, or taking of the trust deed until sometime after it was done, when he expressed his dissatisfaction, but was assured by Granberry that the deed made the debt safe.

In 1874 Stockard died, having first made his will, in which he devised said house and lot to his niece, Mrs. Beech, and made other devises and bequests. Mrs. Beech and her husband, and the administrator of Stockard, were made parties to the suit, Beech and wife claiming that the personal estate of Stockard, if he should be held liable, should first be applied to pay the said judgments. And it appeared that the administrator of Stockard had suggested to the county court the insolvency of his estate.

The chancellor decreed in favor of Granberry for $6,302.32, to be paid first out of the personal estate, and next for any balance out of the house and lot, and lastly, to the extent of $5,000, the penalty of the bond against the surety of Stockard on his injunction bond for any balance. Stockard's administrator and Beech and wife appealed.

The liability of Stockard's estate depends upon the question whether Granberry's interference with the officer having the executions, and his taking a deed of trust for the judgments and other debts, was an act of bad faith, and prejudiced the rights of Stockard. Although there was no express stipulation in the deeds for delay, Ricketts, the deputy sheriff, and George W. Polk, testify that it was understood between the par-

ties that the Polks were not to be pressed if the deeds were executed. But even if such contract for delay had been made between the creditor and principal debtor, this of itself, after judgment, would not release their surety or stayor, who is also a surety, because such surety has the right to judgment against his principal, notwithstanding such agreement for delay. This has been held in numerous cases upon the ground that such delay does not deprive the surety of the means of protecting himself against the payment of the debt. He may obtain judgment and have execution levied on the property liable to the suspended execution of the creditor, and for this reason it has been said a surety has his remedy in his own hands after judgment. The reason why a surety after judgment, or stayor, is not released by extention of time to principal debtor, or by the return of execution without levy by order of creditor, although such principal debtor had ample property liable to execution is, that the surety may have such process in his own behalf, and may levy on the principal debtor's property.

But while it is well settled that mere indulgence or delay on the part of the creditor to collect his debt off of his principal debtor will not release the surety or stayor, because such delay or indulgence is not regarded as doing the surety or stayor any injury, yet the utmost good faith and fair dealing by the creditor toward the surety is required, and if he does any act injurious to him, or omits to do what his duty to him requires he should do, whereby he is injured, he will be discharged from his liability.

This record shows that from the time of the rendition of said fourteen judgments, the Polks had ample property subject to execution, out of which they might have been satisfied. This fact was well known to Stockard, and when the execution in 1865 had been issued for the second time, he was informed by Granberry that the money should be collected on them. They were in the hands of the deputy sheriff, who says he could and would have made the money on them but for the fact that Granberry ordered him to surrender them or return them, when he was about to levy them. This he did do at the same time at which the deeds of trust were taken, without the knowledge or consent of Dr. Stockard.

While the simple return of the executions without levy would not discharge the surety, we are of opinion that Granberry, by taking the trust deed and consenting that these debts or judgments should be postponed to numerous other large debts of Polk's (after promising not to press the collection of the said judgments), whereby the whole of the property was exhausted, and said judgments left unprovided for, did not act with that perfect good faith toward Stockard which the law required of him, and so misled him as to prevent his taking measures for his own protection. The officer had the executions, and was about to levy them on property ample for their satisfaction. Stockard knew this, and had a right to rely upon the consummation which Granberry had promised. But the officer was ordered to return the executions, and at the same time the creditor accepts deeds of trust from

the Polks, conveying all their property, securing first another large indebtedness to himself, and then other large debts to others, and consented to have these fourteen judgments, which were so near being satisfied, among the last debts to be paid, and in fact after foreclosure not a dollar was realized which, under the terms of the trust, could be applied to said judgments. So that although the mere indulgence may be said not to have operated to the injury of the surety, yet the indulgence and the simultaneous swallowing up of all the property of the debtors, thus putting it out of the power of the stayor to avail himself of his right of self-protection, was an injury done to the surety by the creditor. He knew that these executions were about to be levied on this property, and yet he forbids the levy and accepts and agrees to conveyances of this same property to secure other debts due to himself in part, and also to third persons, whereby nothing was left, either in the deed or out of it, which could be applied to the fourteen judgments.

Granberry says he notified Stockard that he was going to take a deed of trust to secure said judgments, a few days before it was done, and that when said deeds were taken he endeavored to have said fourteen judgments placed in the first class, as his other claims were. But Stockard denies that Granberry gave him any such notice, and neither G. W. Polk nor the officer knew of any such notice, and it does not appear that he had notice until sometime after the deeds were executed. And G. W. Polk

says if there had been a proposition to place the fourteen judgments in the list of debts of the first class, he knows of no reason why he should have opposed it. On these judgments the executions issued, and the deed of trust was made upon condition that they should be held up and not pressed, and yet they are so placed in the deeds as that not a dollar could be made available toward their payment.

In an unreported case, of *Bryant* v. *Killough*, decided at Brownsville, April term, 1868, it was held, Judge Smith delivering the opinion, that when the stayor urged the officer having the execution to make the money out of the principal debtor, and the principal debtor, on his applying to him for property, showed him a tract of land of value sufficient to pay the debt, and the creditor told the officer not to levy on the land, and the debtor afterward became insolvent, that the stayor was discharged. This case is not in accord with previous or subsequent decisions of this court.

The stayor there might have obtained his judgment against his principal, and thus have protected himself. The distinction between that case and others in which relief has been refused to stayors and sureties after judgment and this case is, that the creditor did no injury to the surety by simply refusing to levy, whereas by refusing to levy himself, and by aiding in placing the property of his debtor out of the reach of the surety and for the benefit of third persons, he renders unavailing any measures the surety might adopt for his protection. He has, by his active interposition

between his debtor's property and his stayor's remedy, prevented the stayor from enforcing the payment of the debt which he has himself refused to collect by executions, which the surety had reason to believe would be used to collect the debt and relieve him from further liability.

In Freeman on Judgments, sec. 226, it is said that the preponderance of authorities is decidedly in favor of the rule that the creditor, after judgment, can give the principal debtor no preference, nor do any act by which the liability of the surety is increased, and that such acts as discharge the surety before judgment will discharge him after judgment. But in Tennessee the rnle is different, for while a valid contract for delay between creditor and his principal debtor before judgment will discharge a surety, such a contract after judgment will not. 3 Sneed, 541; 10 Yer., 111, 362; 10 Hum., 447; 3 Hum., 412, 553; 5 Hum., 320; 9 Hum., 493; 5 Hum., 249. The reason given for the discharge before judgment is that the surety could only have the same equities against the principal that the creditor has, and if the creditor had bound himself for delay by a valid contract, the surety would be bound also, whereas after judgment the surety may obtain judgment against his principal, notwithstanding the contract between creditor and principal (3 Hum., 412, 545), and for this reason it is supposed the agreement to delay does the surety no harm (10 Yer., 111), and because it does him no harm he is not discharged. It is said, 3 Hum., 413, the surety's remedies against his principal were not

lessened or obstructed by agreement for delay after judgment. A stayor is a surety for the payment of the judgment, and by our statutes is entitled to the same defenses as other sureties. But if the creditor does or omits to do any act injurious to the surety, or inconsistent with his rights, he will be discharged. 3 Hum., 543, citing 1 Story Eq., secs. 325 and 326. If he does any act obstructing the surety's remedy, it is said by implication in 3 Hum., 413, the surety would be released. If he has not only suspended the execution about to be levied on the debtor's property, which would have satisfied the debt, after telling the surety he would levy on it, and then, without the knowledge of the surety, puts the creditor's property out of the reach of the surety for the benefit of third persons, it would seem he had thus effectually obstructed the surety's remedies. The act is necessarily and irreparably injurious. Mere delay would not have been, nor delay for a valid consideration, but the making away with all the debtor's property was an injury and an injustice to the surety. The cases cited upon which the distinction is founded between the surety's rights before and after judgment, refer to delay extended to debtor. But none of these cases excuse any act of the creditor injurious to the surety after judgment any more than before. But they all assume giving time merely after judgment is not injurious.

We are, therefore, of opinion, from the facts disclosed in this record, that Granberry's acts in placing Polk's property beyond the reach of executions, and

suspending his executions, were injurious to Stockard, and that it would be inequitable to hold his property liable to pay a debt which would have been paid but for the act of the creditor. Good faith required of him that he should not put the surety in a worse condition than he was in before the return of the execution, and that he should not make, by his voluntary act, the remedy the law gave him wholly unavailing, if he himself refused to levy the executions which he had promised to do.

The Chancellor's decree will be reversed, and the injunction against the collection of the said fourteen judgments, or any part thereof, from the estate of Stockard, will be made perpetual. The cross-bill is dismissed.

3L 679
4L 54
11L 672
12L 455
13L 689

STATE OF TENNESSEE *et als.* *v.* MARTHA W. DUNCAN *et als.*

CHANCERY COURTS. *Jurisdiction. Sale of land for taxes.* The State, county of Davidson and city of Nashville joined in a bill to enforce their lien for taxes on a piece of property from year to year. Each year tax sales were had at which, for want of other bidders, complainants' officers bid in the property for the amount of the tax, costs, in-

terest, etc. The bill prays for an account and for a sale of the property free from redemption. Held:

1. That such a bill is not multifarious.
2. That the State, county and city may file such a bill in their own name without the intervention of any commissioner or other officer.
3. That the chancery courts have inherent jurisdiction to enforce the lien created by the act of 1813, ch. 98, carried into the Code secs. 554 and 555.
4. That this jurisdiction does not depend upon any act of the Legislature, but is inherent, and that chancery courts were not deprived of such jurisdiction by the Commissioner's Acts of 1872–73.
5. That it is doubtful whether those acts were intended to have general effect, or whether they only applied to taxes prior to their passage.
6. That no good reason is to be seen why sec. 9 of the act of 1875, ch. 81, which re-enacts the lien and declares it to be *enforceable as other liens*, should not be construed as express statutory authority for resorting to any remedy that the law allows.
7. That a statute creating a new remedy without expressly repealing the old remedy, is merely cumulative, and will not deprive a court of its jurisdiction to enforce the old remedy.
8. That the provisions of sec. 4489 of the Code are general, and give the chancery court the power to sell on a credit so as to cut off the equity of redemption in all cases where the specific land to be sold is mentioned in the decree, and that this is not an ordinary statutory tax sale, but the enforcement of the lien for taxes, and that the decree for sale free from redemption and on time was proper.
9. That complainants are entitled only to the costs up to and including the condemnation in the circuit court.
10. That the Chancellor did not err in disallowing all penalties, the penalty prescribed by the act of 1873 being repealed by the act of 1877, and that he did not err in refusing to allow ten per cent. interest claimed by complainants under the Acts of 1875.

FROM DAVIDSON.

This bill was filed in the Chancery Court at Nashville by the State of Tennessee, the county of Davidson, and the Mayor and City Council of Nashville against Martha W. Duncan and other persons having

an interest in the land described in the bill. There were eleven grounds of demurrer, as follows:

1. Because the court has no jurisdiction over the subject matter, or to grant the relief prayed for.

2. Because B. J. Lea, Attorney-General, W. K. McAlister, Jr., City Attorney, John Ruhm and Thos. L. Dodd have no authority in law to file this bill.

3. Because the bill is multifarious, in that it joins parties whose interests are separate, distinct and independent, etc.

4. Because complainants' remedies are full, adequate and complete at law, and they do not allege the exhaustion of such remedies.

5. Because complainants' remedies, under the act 1873, relating to collections of back taxes, are full, adequate and complete, and they do not allege the exhaustion of such remedies.

6. Because this court has no jurisdiction to collect taxes or order sales of property for unpaid taxes, except under said act of 1873, and this bill is not filed under that act.

7. Because this court has no inherent jurisdiction to collect taxes or order sales of property for unpaid taxes, even after all legal and statutory remedies have been exhausted.

8. Because said taxes are not liens on the property, or if liens, statutory liens, and this court has no jurisdiction to enforce the decree by sale.

9. Because the court will not decree a partition except when parties praying for same are owners in common, in possession under an undisturbed title.

10. Because this court will not remove cloud, except where one shows a good legal title in himself.

11. Because there is no statute authorizing the filing of such bill.

The Chancellor overruled the demurrers, and the cause was heard on bill, answer and proof, and a decree rendered in favor of each complainant for the amount of the taxes proper, with six per cent. interest from the day each tax sale took place, also for all the costs up to and including the condemnation in the circuit court, being, in the case of each separate tract, one dollar for entering up judgment of condemnation, and fifty cents for the return of the officer. But all costs of sales, including printer's fees, and the penalties claimed under secs. 570, 571, Acts of 1873, were disallowed. The Chancellor also disallowed the claim of complainants to ten per cent. interest under the act of March 23, 1875, ch. 80. He decreed a sale free from the equity of redemption and on time. Complainants and defendants appealed. A. G. MERRITT, Ch.

ATTORNEY-GENERAL LEA, JOHN RHUM, THOS. L. DODD and W. K. MCALISTER, JR., for complainants.

JAMES TRIMBLE for defendants.

MCFARLAND, J., delivered the opinion of the court.

The bill in this cause was filed in the Chancery Court at Nashville in the name of the State of Ten-

nessee, the county of Davidson and the Mayor and City Council of Nashville, and alleges, in substance, that the defendant, Martha W. Duncan is and, during the time afterward mentioned, has been the equitable owner of two valuable pieces of real estate, particularly described as situated in the city of Nashville. That from the year 1868 to 1878 inclusive, all the taxes assessed for all purposes in favor of the several complainants remain unpaid. That, except for the year 1878, said pieces of property have from year to year been sold under the laws in force at the time, and bid in, in the name of the several Comptrollers, for taxes and costs and charges, no one else bidding. Said sales were in pursuance of condemnation in the circuit court, except for the years 1878 and 1879, when the law did not require condemnation, and when, according to the law then in force, the property was bought in by the proper officer in the name of all the complainants jointly, but no deeds have been taken. The bill then makes the following statement: "Complainants are advised that they did not acquire full and perfect legal titles to any of said property because of irregularities in the proceedings for condemnation, advertisements and sales; furthermore, because the law providing for condemnation and sale of property does not vest complainants with the right and power to become owners in fee of property sold by them for the enforcement of tax assessments and liens under ordinary condemnation and sale at law, and finally, because the fact that complainants' officers bid in the property at their sales probably placed complainants in the posi-

tion of trustees purchasing at their own sales." They say they are willing to perfect the sales if the defendants so elect, in which event they pray a partition among themselves. But that they really only desire the payment of taxes, interest, costs, etc., and are willing, even if the sales in their favor be valid, to waive the right to hold the entire property, and have it sold by decree of the court for the taxes and interest, costs and penalties, giving to the defendant the benefit of all the property, or its proceeds over these sums. And this is in substance the relief prayed for.

Many causes of demurrer were assigned, and overruled by the Chancellor. A very ingenious and earnest argument has been made in support of the demurrer in this court. The stress of the argument has been upon those grounds of demurrer which, in various forms, raises the question of the jurisdiction of the court. The argument may be briefly stated as follows:

That taxes are allowed only in accordance with express statutory provisions. That especially the lien claimed upon real estate for the taxes due thereon is only given by statute, and our statutes point out special statutory remedies for the collection of all taxes and the enforcement of all liens for taxes, and by necessary implication prohibit the enforcement of such rights in other modes upon the principle that where a statute creates a new right unknown to the common law, and at the same time gives a specific remedy for its enforcement, the right cannot be enforced in any other mode, and that a court of chancery ha-

no ordinary inherent jurisdiction of a case of this character.

It is argued that the ordinary statutory mode of reporting, condemning and selling lands, changed afterward by the act of 1875, to a sale without condemnation, is the remedy given in the first instance in the collecting of taxes. That in cases like the present, where lands have been sold under proceedings that turn out to be invalid, a special remedy is given under the acts of March 27, 1872, and March 21, 1873, which provide for a special commissioner, and give authority to him to file a bill in his own name in the chancery court for the sale of the land for the taxes, etc., in the manner therein set forth, and that the remedy given in these acts apply especially to a case like the present, and exclude all other remedies; that the present bill is not filed in the name of a commissioner, and is otherwise a departure from the remedy specified in these acts, and consequently cannot be maintained. Taxation is regulated by statute, but the right is inherent in the government, and while remedies are given by statute, yet it was held as far back as 1828, that taxes, when assessed, become a personal debt, and the government is entitled to all the remedies for their collection, including an ordinary suit at law, if it chooses to resort to that remedy. *Mayor and Aldermen of Jonesboro* v. *McKee*, 2 Yer., 167. And the same in substance was held in the case of *Rutledge* v. *Fogg*, 3 Col., 554, where a claim for taxes was allowed to be filed as a debt, and paid

out of the proceeds of the realty in an insolvent proceeding in chancery.

The lien given for taxes is statutory, but the original act of 1813, which first declares the lien, does not appear to have pointed out any special mode for its enforcement. But it can hardly be doubted that any valid sale of land for taxes in the ordinary mode pointed out by the statutes, either then or subsequently in force, would relate to the date of the assessment and entitle the purchaser to the benefit or the lien from that date, and no proceeding instituted with special reference to the enforcement of a lien was necessary. No such proceeding for the enforcement of a lien was ever required by statute to be instituted. Though the right to resort to the ordinary mode of enforcing liens might be held to exist (though we do not decide this), according to the principle of the case referred to, yet it was never resorted to because a more expeditious and less expensive remedy was given.

It will be remembered, however, that this is not an ordinary case of unpaid taxes, where the summary statutory remedy is unembarrassed, but a case where the lands have from year to year been sold and bought in for the taxes and costs, and knowing, however, the difficulty of maintaining the validity of these sales, the State hesitates to engage in a litigation with the owner for the recovery of the land, a litigation likely to enure to the benefit of the owner by causing still further delay, and not likely to accomplish any good result for the State, and further, desiring only the payment of the taxes, equitable relief is sought. The

ordinary statutory remedy for a sale would but more likely still further complicate the matter. A chancery court would not refuse to take jurisdiction in behalf of an individual whose rights might be thus complicated. There could be no good reason for denying to the State all the remedies afforded to individuals, unless there be an express prohibition, especially when all other remedies have been practically of no avail. But it is argued that the remedy given by the acts of 1872 and 1873, in cases precisely of this character, are exclusive. In the first place, it is doubtful whether those acts were intended to have general effect. After reciting in the preamble that in many instances lands have been sold for taxes and bought in the name of the Superintendent of Public Instruction, and the sales are probably valid, it is enacted that a commissioner be appointed in each county to collect these back taxes; that within ninety days from the passage of the act he should be furnished with a list of all such cases, and the act then proceeds to authorize such commissioner to file a bill in his own name for the sale of said lands, and it may be doubtful whether the entire act does not relate simply to a sale of these lands required to be reported to this commissioner; but we did not decide this, it not being, in our opinion, necessary. It may be further observed that, if it be conceded that these acts apply, the only very serious objection to sustaining the jurisdiction in the present case under them, is the fact the bill is not filed in the name of a commissioner. Yet it was held by this court that such a bill could be main-

tained, under these acts, in the name of the city of Memphis, without a commissioner. *City of Memphis* v. *Looney*, 1 Leg. Rep.

But we place our decision of this question upon broader ground, and that is that the court has jurisdiction independent of the act, and that this is not a proceeding under these acts. Previous to the act of 1872 there was no adequate statutory remedy given in a case of complication and embarrassment like the present for the collection of back taxes. And previous to that time a court of chancery could hardly have refused to take jurisdiction. Such jurisdiction would have been inherent. If so, the passage of that act did not divest a jurisdiction previously vested.

This would be our conclusion independent of any express statutory authority for equity jurisdiction; but the act of 1875, ch. 81, sec. 9, re-enacts the lien declared by the act of 1813, and declares that "until the taxes on any real estate are paid there shall be a lien for the same—first to the State, second to the county, third to the city, and fourth to the railroads, *enforceable as other liens.*" We see no good reason why this should not be construed as express statutory authority for resorting to any remedy for the enforcement of the lien that the law allows to individuals for the enforcement of liens in their favor.

We pass by the question whether the principle that the giving of a statutory right with a statutory remedy is a prohibition of all other remedies, applies to the Government. See *Savings Bank* v. *United States*, 19 Wal., 233. At all events, needful remedies not

especially prohibited ought not to be denied to the Government where, upon similar facts, the same remedies would not be denied to individuals. A bill similar to this was sustained by Judge Cooper as Chancellor in the case of *Edgefield* v. *Brien*, 3 Ch. R., —, and to his reasoning in that case, as well as the reasoning of Judge Turney in *Memphis* v. *Looney*, reference is made.

The enforcement of the collection of taxes so as to make the burden fall as nearly as possible upon all alike, has been one of the most difficult of legislative problems. To this task the Legislature has, from term to term, devoted much time and attention, and stringent laws have been enacted, and it is perhaps to be regretted that the courts have, in some instances, adopted a line of decisions that have rendered the laws ineffectual. A very considerable class of property owners persistently and systematically refuse, from year to year, to bear their just proportion of the public burden. Knowing that tax sales are usually held void, they utterly disregard them, and set the demands of the law in this respect at defiance. In this way large deficits occur which must be made up by the other tax payers.

In the present case one of the lots has been valued at from $15,000 to $20,000, the other from $6,000 to $12,000, and yet for nine years not a dollar of taxes have been paid, nor is any excuse or apology offered for it. Under these circumstances the argument so ably and so earnestly made against the jurisdiction in this case, upon the ground that the taxes may be

paid to some one not under bonds or not authorized by law to receive it, does not seem to be controlling, inasmuch as the interests of the State, county and city cannot well suffer more seriously or their rights be more embarrassed than they are at present.

Without discussing the other grounds of demurrer, the decree of the Chancellor overruling the same will be affirmed.

The complainants appeal from the final decree of the Chancellor, and assign for error his refusal to allow the costs of advertising and selling the property in the various sales referred to. If the sales were void, we see no principle upon which the owner could be required to pay the costs thereof. There is nothing in the records from which they can be determined except the statement of the bill that complainants are advised that they did not acquire perfect legal title to any of said property by reason of irregularity, etc., as well as for other reasons.

It was, perhaps, not necessary that this concession should have been made. The complainants might, perhaps, even upon the assumption that the sales were perfectly legal and valid, well have preferred to waive their rights to the property, claiming only lien for all taxes, costs, etc., and concede to the defendant the right of redemption. If the defendant accepted this concession the court would have jurisdiction, and the right of the complainants to all costs would be clear. If the defendant refused to accept the concession, the county would have the right to sell the property as their own. *Webb* v. *Miller*, 8 Heis., 448. We think,

however, upon the conclusion of the bill, that we must take it that the sales were invalid, and that the Chancellor's decree upon this point was correct.

We are further of opinion that the Chancellor was correct in disallowing all penalties. The penalty prescribed by sec. 61 of the act of 1873 was repealed by the act of 1877, and this, in our opinion, left no other penalty in force applicable to a case like the present.

It is next argued that it was error to decree a sale on time without the equity of redemption. It is true that all the provisions of our statutes providing for a sale of lands for taxes provide for the right of redemption, but these acts contemplate the ordinary tax sales, made in the usual mode. It is also true that the acts of 1872 and 1873, above referred to, provide that the sales therein authorized shall be with the right of redemption, but as we have seen, this is not a bill under these acts.

The provisions of our Code, sec. 4489, are general and comprehensive, and give the chancery court the power to sell on a credit, so as to cut off the equity of redemption in all cases where the specific land to be sold is mentioned in the decree. In our opinion these provisions are broad enough to include this case.

The defendant has certainly had ample time. The unreasonable delay in payment has made a resort to a chancery court necessary, and the defendant cannot complain of the result. Simple justice to the prompt taxpayers of the State, as well as the spirit of all our legislation and the dictates of a sound pub-

lic policy, alike require that the courts should rigidly enforce all lawful remedies against willful delinquents.

The decree of the Chancellor will in all respects be affirmed with costs.

SAMUEL DONELSON *et als.* *v.* THE STATE.

1. SUMMARY PROCEEDINGS. *Motion by the State. Circuit Court. Jurisdiction.* A motion by the State against the clerk of a criminal court and his sureties for a failure to pay over revenue, may be made in the circuit court.

2. SAME. *Revenue.* The term "revenue" includes not only money raised by some of the modes of taxation, but in one sense all money belonging to the State.

3. SAME. *Jail fees. Costs certified as required by statute is in the nature of a judgment.* If jail fees in felony cases are taxed to the county and *certified*, as required by the statute, by the *Attorney-General* and *Judge* as *properly taxed*, and as costs accrued on *behalf of the county*, it is in the nature of a judgment, and the county not having appealed therefrom, the clerk, having collected such fees, will not be heard to object that the county was not liable for such fees.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. FRANK T. REID, J.

E. H. EAST, W. A. THOMA and J. D. WADE for Donelson.

ATTORNEY-GENERAL LEA and T. MATHEWS for the State.

McFARLAND, J., delivered the opinion of the court.

This is a motion by the State against Donelson and his sureties for money which he collected, or should have collected, while Clerk of the Criminal Court of Davidson county, belonging to the State, which he has failed to account for or pay over. The judgment was for the State, and Donelson and part of his sureties have appealed.

The first objection is, that the Circuit Court of Davidson county, in which the motion was made, had no jurisdiction; that the motion was cognizable alone in the Criminal Court, of which Donelson was clerk. The Code, sec. 3589, in the article devoted to general provisions relating to summary proceedings, enacts that "the motion shall be made, unless in cases where otherwise provided by this Code, as follows: "Where the motion is against an officer for official default, it may be made in the court in which the officer was acting officially at the time, or in the court to which process was returnable, when the default consists in the failure to execute or return process."

It is argued that this motion was for official default of the clerk, and should have been made in the court of which he was clerk. It was held in the

case of *Smiley* v. *Bigley*, 5 Sneed, 280, that the Criminal Court of Davidson county had jurisdiction to render judgment by motion against its clerk for costs due the sheriff. It was said that the circuit court had this jurisdiction, and the act creating the Criminal Court of Davidson county was intended to give the same remedies against its clerk, but at all events the act of 1824 makes the clerk of any court liable to the motion in that court, so that a motion in favor of an individual would lie in the criminal court against the clerk; whether in the circuit court also or not, it is perhaps unnecessary to inquire. But in respect to the State there are other provisions. Sec. 207, sub-sec. 32, makes it the duty of the comptroller to enforce collection from any person charged with the collection of any branch of the State revenue at the first or any subsequent term of the circuit court after it becomes due, when there is apprehension of loss.

Sec. 730 is as follows:

"Any officer concerned in the collection of revenue who has failed to collect, make returns or settlement, or pay over moneys of the State by him received, at the time and in the manner required by law, may be proceeded against summarily by motion in the *Circuit Court* by the proper law officer of the State, pursuant to the instructions of the comptroller."

As sec. 3589 limits its operation to cases not otherwise provided by the Code, it is clear that the above section is broad enough to give the jurisdiction to the circuit court, if the money sought to be recovered is "revenue." This, however, is denied as

to a large part of the recovery. It appears that the larger part of the sum recovered is claimed to be due the State in this way.

In a number of prosecutions for felony in the Criminal Court of Davidson county, where the defendants were in jail, the jail fees were collected from the State monthly in advance, in accordance with section 5435b.c., T. & S. Code. Upon final trial and conviction, these fees were taxed in the bill of costs, which the defendant was sentenced to work out in the workhouse, and were thereupon paid to the clerk by the county. It is argued that if the State is entitled to this money at all, it is not revenue, and the motion given by sec. 730 does not lie; and besides, as the State in its motion specially moves for "revenue unaccounted for," proof of the facts indicated does not sustain the motion. It is true this is not one of the sources of revenue defined by the statute. Code, sec. 538. Perhaps in its exact definition it may be confined to money raised by some of the modes of taxation, but in one sense all money belonging to the State is revenue.

It is claimed that this should be more properly described as "costs." But strictly speaking the State does not render service for which it is entitled to costs. These costs are paid by the State out of its revenues, and the motion is to collect the money for reimbursement. It is a civil proceeding, properly cognizable in a civil court, the circuit court being one of general jurisdiction. We hold, therefore, that the circuit court had jurisdiction.

2. It is objected that the motion is not predicated upon the proper bond. Secs. 326, 327 and 328, in respect to clerks in general, require different bonds to be given, one in the penalty of $5,000, to secure taxes on suits, fines and forfeitures, and it is claimed that the bond now moved upon is this bond, and was only intended to cover taxes on suits, fines, and forfeitures, and the liability in the present case does not come under either head. But the act creating the criminal court of Davidson county in express terms requires the clerk to give a bond in the penalty of $5,000 for the faithful performance of his duties to secure fines, forfeitures and *other moneys* coming to his hands as clerk, and it is provided that the clerk is to be liable to motion upon the bond as other clerks. The present bond is given in conformity with this act, and is in terms as general as the act requires, and it is clear that the liability arises upon this bond. See sec. 4258, Code.

Again, it is earnestly argued that there should have been no recovery as to the jail fees claimed. The argument is, that in felony cases the State and not the county pays the costs where it cannot be made out of the defendant, and there is no provision or authority of law requiring the county to refund to the State any part of such costs paid by the State, nor in fact any authority upon the part of the county to pay such costs, and if the costs were paid by the county to the clerk it was money paid by mistake, and should be recovered back by the county.

The act authorizing the payment of the jail fees

in advance from the State and county provides that if any part of the fees be afterward collected from the defendant the same shall go to reimburse the State or county, as the case may be.

It is argued that the theory upon which the fees in this case were taxed to the county is, that the defendants in the several cases were adjudged to work out the costs in the workhouse, and in this mode the county realized the amount, and was liable to pay the same to the parties entitled. The objection to this is that the cases in which the fees were paid by the State were felony cases, and that the only cases in which defendants can be sentenced to work out the costs are misdemeanor cases, and that there is no authority of law for a county to pay the costs except in misdemeanor cases. The act of 1875, in relation to sentencing defendants to work out fines, costs, etc., in workhouses, after providing that persons convicted of misdemeanors shall, unless the costs are otherwise secured, in addition to any imprisonment imposed upon him as punishment, be sentenced to work out the fine and costs at a certain rate specified, provides that the county shall pay the costs in misdemeanors as now, and the net proceeds of the convict's labor shall be paid into the county treasury. See Acts of 1875, p. 117. Sec. 13 provides that every person sentenced to imprisonment in the county jail shall be compelled to work in the county workhouse unless he gives bond and security to secure the jail fees and other expenses incident to his imprisonment, in which event the county is to be released from liability in respect to such fees

and expenses. The record in the present case shows that it was agreed by the counsel that the jail fees in question were collected from the State in advance by the jailor for keeping certain prisoners "charged with larceny, and one charged with malicious stabbing. On conviction these prisoners were sent to the work-house of Davidson county, and the jail fees were taxed as part of the costs which they were sentenced to work out. The fees were included in the bills of costs which were made and certified and presented to the County Judge for payment, the amount being taxed "as jail fees to be returned to the State." It is argued with much plausibility that the act of 1875, before referred to, does not, nor does any other statute, give authority for requiring the county to pay the jail fees or other costs in felony cases. That act does provide that in misdemeanor cases the county shall pay the costs as before, not so much, as it is said, upon the assumption that the county would be re-imbursed by the labor of the convict, as this would be uncertain, but because the county would be liable for such costs in all misdemeanor cases where they could not be collected from the defendant, and if re-imbursed by the convict's labor it was well, or if not, the county would lose it as before. But there is no provision that in felony cases the county shall re-imburse the State for costs paid in advance by the State. That it would be unwarrantable to assume that the fees were in fact collected from the defendant and paid to the county by the defendant's labor, as in fact in many if not most cases, the convict is

released, or otherwise avoids the labor, so that there is no authority on any ground to adjudge the fees against the county. All this would be a matter of serious consideration but for the fact that this record shows that the defendants in the several cases were sentenced to work out the costs in the county workhouse, and the costs were taxed to the county, including the jail fees, and certified, as required by the statute, by the Attorney-General and Judge as properly taxed, and as costs accrued on behalf of the county.

This, as we have held, is itself equivalent to a judgment. The defendants in the cases and the county have submitted to the judgment of the criminal court, and we cannot declare the judgment void. Whether or not these judgments would have been held erroneous upon appeal, we need not determine.

It is again argued that the county did not pay these fees to the clerk, but upon that point we think the evidence sustains the verdict.

Judgment having been rendered against the county, and the money having been paid by the county to the clerk, and belonging in fact to the State, the motion was properly sustained, and the judgment will be affirmed.

The second case against the same parties is for State taxes upon litigation during a subsequent term of office. The same question is made as to the jurisdiction of the court, and also part of the State taxes claimed were collected from the county in the manner

indicated as to the jail fees, that is, as the defendants were sentenced to work out the costs in the work-house, the costs were taxed to and collected from the county, including the State tax.

For the reasons indicated in the foregoing opinion, we hold that whether this was erroneous or not, it was a judgment from which there was no appeal, and not being void is conclusive upon the parties. The other questions have been considered, and we are of opinion that there is no error in the record.

Judgment affirmed.

THE STATE *v.* JOHN C. FERRISS.

1. CRIMINAL LAW. *Indictment.* The allegation in an indictment that "a more particular description is to the jurors unknown," cannot have the effect of dispensing with such description of the offense as will protect the defendant from a second prosecution for the same offense; but if a *particular fact* which is matter of description and *not vital* to the accusation cannot be ascertained, the indictment may charge that such fact is unknown to the jurors.

2. SAME. *Same.* A charge that the defendant willfully and unlawfully drew and issued warrants for costs "against the County of Davidson," etc., is bad, for the statute requires that warrants be drawn on the *County Trustee*, and not upon the *County*.

State *v.* Ferriss.

2. SAME. *Same.* A charge in an indictment that the defendant, as Judge of the County Court, did willfully and unlawfully draw and issue *warrants* against the county, etc., is bad, because it charges two or more offenses in the same count. The drawing of each warrant was a separate and substantial transaction, and a criminal prosecution would lie for each if the drawing was willfully and illegally done.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. J. M. QUARLES, J.

ATTORNEY-GENERAL LEA, W. D. COVINGTON and G. J. STUBBLEFIELD for the State

A. L. DEMOSS, J. C. GUILD and T. L. DODD for Ferriss.

DEADERICK, C. J., delivered the opinion of the court.

John C. Ferriss, Judge of the County Court of Davidson county, was indicted in the Criminal Court of said county, as it is said in the argument, under section 4816 of the Code. That section makes it a misdemeanor "for any public officer or person holding any public trust or employment, to neglect to perform his duty, when no special provision has been made for the punishment of the delinquency." The offense intended to be charged in the indictment is, that the defendant drew warrants for costs, against the county, without being regularly taxed by the clerk and examined by the attorney general and judge of the court

in which the costs accrued, and without their certificate that the costs were correctly taxed and lawfully chargeable upon the county, in contravention of the provisions of section 527 of the Code. The indictment was quashed below, and the State has appealed in error to this court.

It contains two counts. In the first count, after reciting that the defendant was elected and qualified and acted as judge of the county court of Davidson county, it is charged that while so acting in his judicial capacity as judge, etc., he, "On the 15th day of August, 1878, unlawfully, willfully and negligently did issue and draw warrants against the county of Davidson, for costs against said county of Davidson, for the value and amount of thirteen thousand nine hundred and fifty-five dollars and thirty-nine cents, a more particular description of which is to the jurors unknown." And then avers that the costs for which the warrants were issued, were not taxed, etc., as required by section 527 of the Code.

The second count charges defendant with issuing and drawing warrants "against the county of Davidson, for costs accruing in the Criminal Court of said county of Davidson, a more particular description of which is to the jurors unknown, of the value and amount of thirteen thousand nine hundred and fifty-five dollars and thirty-nine cents."

Then the indictment avers that the said costs for which said warrants were issued and drawn, as aforesaid, against the county of Davidson, had not been regularly taxed, etc., as in the first count, except that

the names of Sam. Donelson, cl'k, A. J. Caldwell, att'y gen'l, and Thos. N. Frazier, judge, are given.

The allegation in the indictment that a more particular description of the warrants is to the jury unknown, cannot have the effect of dispensing with such description of the offense as will protect defendant from a second prosecution for the same offense.

It is the general rule, that the special matter of the whole fact should be set out in the indictment with such certainty that the offense may judicially appear to the court. 1 Bish. C. L., section 285. The exceptions to the general rule are in cases of owners of stolen property and unknown dead bodies in murder cases, in which case the indictments may charge the names as unknown. Bish. C. L., sections 242, 251. So if *a particular fact* which is matter of description and *not vital* to the accusation, cannot be ascertained, the indictment may charge that such a fact is unknown to the jury.

The cause has been ably and exhaustively argued for both the State and defendant. His Honor, as before stated, quashed the indictment upon the ground, as stated in the argument, of the defective description of the warrants.

Several other grounds are here insisted upon for the affirmance of the judgment. Conceding, but not deciding, that the section relied upon is sufficiently broad to sustain a prosecution for malfeasance in office, while its terms provide a punishment, only, for neglect to perform a duty, we are nevertheless of opinion that the judgment of the Judge of the Criminal Court

in quashing the indictment, was correct on several grounds.

The indictment charges the drawing and issuance of warrants against the county of Davidson, obviously meaning that they were drawn upon the "County of Davidson." The statute requires the judge or chairman of the county court to draw his warrants on the *County Trustee* for the payment of any judgment or debt due from the county. Section 527 of the Code does not mean that a warrant may be drawn against or directed to the county, but that a warrant shall be drawn on the County Trustee for the payment of costs which have accrued against the county, when duly certified, etc. If the proof showed such warrants were on the "County" or "State," *eo nomine*, it would not support the charge of violation of sections 525 to 527 inclusive.

Each count charges the issuance and drawing of warrants in the plural number, to the value and amount of $13,955.39. In the nature of the act, the drawing of each warrant was a separate and substantive transaction; although, when drawn, all might have been issued at the same time. There might be a thousand or more, or a less number of warrants charged in the indictment as having been issued. For the drawing and issuance of each, if willfully and illegally done, a criminal prosecution would lie. And there is no such description of any one of them, all other objections out of the way, upon the face of the indictment as would protect defendant, in case of a conviction or

acquittal for drawing or issuing it, from a second trial for the same offense.

It was long ago held by this court, and the principle has been repeatedly recognized and approved since, that the description of the offense charged in the indictment should be competent to these purposes:

1st. To the information of the defendant, that he may know what offense he is called upon to answer.

2d. To the information of the court, that it may see a definite offense on record, to which to apply the judgment, and the punishment which the law prescribes.

3d. To the protection of the defendant against a further prosecution for the same offense.

It must be borne in mind that these requirements are as to offenses charged in the indictment, and not as they may be shown or explained outside of the indictment. What protection, then, would a conviction or acquittal afford under the indictment in this case? The averments are, that he drew and issued warrants on the County of Davidson on the 15th of August, 1878, for $13,955.39. But no description is given of any one of them by which it could be identified. It is not averred here how many were issued, and although it is averred that they were drawn and issued on the 15th of August, 1878, it is not averred that they bore that date, nor is it stated for what amount each or any one was drawn, or to whom payable.

The Attorney General has cited two cases in 3d Heiskell as sustaining the indictment in this case.

One of *State* v. *Ailey*, the other of the *State* v. *Irvine*, in both of which the court sustained the indictments.

The first named was an indictment under section 4606 of the Code, which enacts that "no person shall unlawfully and maliciously slit, cut off, or bite off the nose, ear or lip of another, or any part of either of them, whereby the person is maimed or disfigured." The indictment charged that defendant, etc., "did slit, cut off and bite off the ear of John Tarwater," etc. The court said the defendant could not be embarrassed in making his defense, nor could the court be at a loss to pronounce judgment.

In the other case, defendant was prosecuted for selling and giving away liquor near an election ground in the city of Jackson, to one Theodorick Webb. It was said in that case that the offenses were created by the same act, are of the same character, and punishable alike, and both offenses tend to produce the same evils, which it is the object of the statute to prevent. And following the case in 10 Hum., 419, the indictment was sustained. Those cases are exceptional and not in harmony with the general rule, that but one offense should be charged in the same count of an indictment. In the case under consideration, however, there are marked differences from the two cited. In these two cases these offenses were so described as to protect defendant from any second prosecution for the same offense. There were but two or three different modes charged of violating the law in these cases, which were embraced in the same clause, were of like nature and character, not embarrassing the defense,

while in this case perhaps one hundred or even one thousand offenses are charged, and no description of any one of them in the indictment which would protect defendant from a second prosecution.

Other questions have been raised in the argument, but we deem it unnecessary to discuss them.

Let the judgment be affirmed.

M. L. KIGGIN *et als. v.* OWEN SHARKEY.

SUMMARY PROCEEDINGS. *Motion will not lie against Constable and his sureties—when.* A motion will not lie against a constable and his sureties for money collected by the constable on a note, the amount due upon which at the time of collection was above the jurisdiction of a justice of the peace, although the constable gave a receipt for the collection of the note in his official capacity.

FROM DAVIDSON

Appeal in error from the Law Court of Davidson county. J. C. GUILD, J.

CHAS. MORLEY for Kiggin.

B. F. SOUTH for Sharkey.

COOPER, J., delivered the opinion of the court.

Motion against a constable and his sureties, for money collected and not paid over, made before a justice of the peace, and carried by appeal to the Circuit Court. It was tried by the judge without a jury, and from his judgment in favor of the plaintiff, the defendants appealed in error.

The plaintiff below held a note payable to him for $500 borrowed money, dated August 23d, 1873, at twelve months, with interest from date. Two or three months after the note was executed, being about to go to California, he gave the note to defendant Kiggin to collect, taking his receipt as constable. The Circuit Judge found as a fact, and the weight of evidence sustains the finding, that Kiggin, on the 7th of September, 1874, collected $230 of the note, and paid to Sharkey $55. This motion was for the failure to pay over the residue of the money collected.

By statute, a motion lies before a justice of the peace, in favor of the party interested, against constables and their sureties, on the constable's official bond, "for any money collected or received by them upon any debt or demand cognizable before a justice of the peace," and put into the constable's hands for collection, "whether such money was received before or after the issuance of a warrant for such debt or demand, and with or without judgment or execution."

Code, sections 3600, 4167. At the time the collection in this case was made, the jurisdiction of justices of the peace over promissory notes was limited to $500. The amount due upon the note on which the collection was made, at the time of the receipt of the money, exceeded $530. The debt or demand was, therefore, not cognizable before a justice of the peace, and the motion would not lie. The object of the statute was to limit the liability of the sureties of a constable to collections made on claims within the jurisdiction of a justice of the peace, and which the constable could collect by virtue of his office. As to claims above a magistrate's jurisdiction, he can only act as the agent of the creditor, and not in his official capacity. *Commonwealth* v. *Sommers*, 3 Bush, 553.

The judgment below must be reversed, and a judgment rendered here in favor of the plaintiffs in error, with costs.

MARY A. CARTER, by next friend, *v.* DALE, ROSS & Co. *et als.*

TENANT BY CURTESY. *Separate Estate.* The husband is entitled to be tenant by curtesy in his wife's separate real estate, notwithstanding he was cut off from any participation in the rents and profits during coverture, if there be no words in the instrument creating the separate estate clearly indicating a purpose to cut him off from the curtesy.

FROM GILES.

Appeal from the Chancery Court at Pulaski. W. S. FLEMING, Ch.

T. M. JONES for complainants.

W. H. MCCALLUM, J. S. WILKES and H. H. HARRISON for defendants.

MCFARLAND, J., delivered the opinion of the court.

The only question in this case is, whether Milton A. Carter has a life estate in the land in controversy as tenant by the curtesy. Thomas E. Abernathy conveyed the land to his daughter, the operative words of the deed being to "Mary P. Barber, her heirs and assigns forever." * * * "To have and to hold the same to the said Mary P. Barber, her heirs and assigns forever, and to be her sole and separate estate, and to be free from the control and liabilities of any

husband she may hereafter have, with full power to dispose of the same at all times as she deem proper."

Said Mary P. Barber afterwards married Milton A. Carter, by whom she had issue born alive, and died without exercising her power of disposition. The creditors of the husband were proceeding to subject his life estate to the payment of their debts, when this bill was filed by the heir asking for an injunction.

It is assumed in argument, that the husband cannot be tenant by the curtesy of the separate real estate of his wife. It is true, Judge Sneed says, in delivering the opinion of this court in the case of *Bottoms* v. *Corley*, 5 Heis., 6, that this is the settled doctrine of the law. The point, however, did not arise in that case, the only question there being, whether the creditors of the husband could reach the issues and profits of the wife's separate real estate, the husband and wife being then both alive. Judge Sneed refers to several cases in support of his position, particularly *Hearle* v. *Greenbank*, 3 Atkyns, and other English cases. His attention seems not to have been called to our own case of *Baker* v. *Heiskell*, 1 Col., 642. In that case, by a decree of the Chancery Court, the title of the land was vested in a "trustee, his heirs and assigns," in trust for the sole and separate use and benefit of Eliza Heiskell, her heirs, executors and assigns. The trustee was "to receive for her use and the use of her heirs, etc., all the rents and profits of said land and to pay the same to her and her heirs." She was empowered to declare the uses and trusts for which said trustee shall hold said land by

deed or will, but she died without exercising this power. She having had issue born alive, by her husband, Judge Caruthers, delivering the opinion of the court, said: "We think the authorities are clear, that her surviving husband became tenant by the curtesy of said estate. This, he says, "has always been the law in England and in this country, although the wife was not entitled to dower in the equitable estates of her husband, until the law was changed by the act of 1823, then very properly establishing equality of rights." He adds, that the husband's right to curtesy can only be excluded when the intention is clearly expressed. He refers to 4th Kent's Com. The argument of the opinion in *Bottoms* v. *Corley* is, that in case of a separate trust there is not sufficient *seizin* to give the husband curtesy; the wife having the rents and profits of her separate estate, her *seizin* does not enure to the benefit of her husband. See 1 Washburne, 151, referring to the cases of *Hearle* v. *Greenbank*, 3 Atkyns, and *Sweetable* v. *Bowden*, 2 Vern.

Chancellor Kent says: "Though the husband be entitled to his curtesy in a trust estate, it has been a questionable point whether it must not be such a trust estate as to give him an equitable *seizin*. The opinions of Lord Hardwick in *Hearle* v. *Greenbank*, and *Roberts* v. *Dixwell*, are conflicting and cannot be reconciled; and it would seem to have followed that if the equitable freehold was out in trustees for the separate use of the wife and kept distinct during the coverture from her equitable remainder in fee, that she wanted that *seizin* of the entire equitable estate requi-

site to a tenancy by the curtesy." "But," he adds, "it is now settled otherwise, and the husband is tenant by the curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during the coverture. The receipts of the rents and profits are a sufficient *seizin* of the wife." See 4 Kent, 31, referring to 3 Bro. Ch., 50; *Morgan* v. *Morgan*, 5 Mad. Rep., 248.

This is the authority followed by this court in the case of *Baker* v. *Heiskell*. More recently the question again came up directly in the case of *Frazer* v. *Hightower*, reported in 1 Tenn. Leg. Rep., 190, and the case of *Baker* v. *Heiskell* was followed, and Burton, Special Judge, says it is the settled law in Tennessee. See, also, 1 W. on R. P., 151–2.

In the case last referred to, the language of the deed was very similar in its operative words to the present, except that in that case, as in the Baker and Heiskell case, there was a trustee, while in the present case the conveyance is direct, and tenancy by the curtesy attaches more certainly to the legal than to the equitable estate; but we do not attach any importance to this difference.

The counsel for the complainant has relied in argument upon the cases of *Hamrico* v. *Laird*, 10 Yer., 221; *Loftus* v. *Penn*, 1 Swan, 448; *Ware* v. *Sharp*, 1 Swan, 489, and *Gardenhire* v. *Hinds*, 1 Head, 405. These were all cases of trust estate in slaves and other personal property, and do not raise the direct question. It is true that they involve to some extent the same principle. These all concede that to exclude the right

of the husband to take the personal property as administrator, the purpose to exclude him, not only during coverture but after the death of the wife, must be clearly expressed, otherwise he will not be excluded, and in these cases language was used in the instrument of settlement which the court held was sufficient to express the purpose, and we may add, that there was not much doubt of this in any of the cases, unless it be the one last cited.

Under these authorities we hold that all the requisites concurring, the husband may be tenant by the curtesy of his wife's separate real estate, notwithstanding he is cut off from any participation in the rents and profits during coverture. But if the purpose to cut him off from the curtesy be clearly expressed in the instrument of settlement, then this right is gone, although formerly this could not be done at law. See 4 Kent, 31–32; 1 Washburne, 151–152.

The only remaining question then is, whether such purpose is expressed in this case. Words which merely create a separate estate in the wife during coverture, will not be sufficient for the purpose; so words which merely deprive the husband of any right to control the estate during coverture or to make it liable for his debts, will not have this effect. For to secure the estate to the sole use of the wife has the effect to deprive the husband of such rights, and the addition of these words in express terms denying to the husband any control, or providing that his creditors shall not reach the estate, though often used as a matter of precaution, in this respect add nothing to the force

of the general words securing the estate to her sole and separate use. The intent to cut off the husband's right to the curtesy must, in some form, be expressed. In respect to the language of this deed, it is sufficient to say, that it is not stronger against the husband's rights than in the cases of *Baker* v. *Heiskell*, 1 Col., 642, and *Frazer* v. *Hightower*, 1 Tenn. Leg. Rep., 190, in both of which cases it was held that the husband's right to curtesy was not cut off. The language simply denies his rights during coverture.

The result is, the decree of the Chancellor must be reversed and the bill dismissed.

3L 715
11L 89

C. W. Trousdale, Adm'r, *v.* H. H. Thomas *et als.*

1. Pleading. *Amendment of declaration. Statute of Limitations.* Where the action was in detinue and the declaration in trover, it is not reversible error in the trial court to refuse an application by the plaintiff to amend his declaration by a count on the facts of the case for neglect, upon the objection of the defendants that the new cause of action was barred by the statute of limitations.

2. Evidence. *Affidavits.* If the defendant offer as evidence the affidavits of the plaintiff, in relation to the demands in suit, for the purpose of having the benefit of the plaintiff's receipts of other demands written

on, and expressly referring to the affidavits for the description of the demands for which the receipts were given, it is not error to charge that the affidavits were not evidence of the truth of their contents, but only evidence of the fact that the plaintiffs made the claims therein set forth.

3. BANK OF TENNESSEE. *Seizure by military authorities. Appointment of agents, by the State officers, to examine assets of the Bank, under act of the Legislature, not conversion.* The States of Tennessee and Georgia were, in the spring of 1865, so far in a state of war that the seizure by the military authorities of the United States of the effects held by the officers of the Bank of Tennessee deprived those officers of all control over the same, and vested the executive officers of the State of Tennessee, to whom the military authorities surrendered the effects for the State, with authority to safely keep them until the Legislature should direct what disposition should be made of them, and the possession of the State officers afterwards under an order of the Legislature to take charge of and examine the effects, and the employment of agents to make an examination and schedule thereof, under an act of the Legislature, would not be a conversion, either in the State officials or the agents. And an order by the Legislature to take charge of and examine the assets of the Bank of Tennessee, would include special deposits.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. N. BAXTER, J.

J. C. GUILD and BAXTER SMITH for Trousdale.

N. S. BROWN for Thomas *et als.*

COOPER, J., delivered the opinion of the court.

In February, 1862, in view of the expected entrance of the Federal army into Nashville, the Bank of Tennessee removed the contents of its vaults, including the special deposits of individuals, to the south. In the month of May, 1865, the effects thus removed

were seized by the commanding officer of the Federal troops in the State of Georgia, and, after some correspondence with Wm. G. Brownlow, the then Governor of this State, brought to Nashville, and, under the orders of the Federal General commanding, delivered to the Governor, Comptroller and Secretary of State, who personally received them, and caused them to be carried to the State Capitol and deposited in a room guarded by soldiers furnished by the Federal General. The Legislature of the State was then in session at the Capitol, and a resolution was at once introduced into that body and passed a few days thereafter, instructing the Governor, Secretary of State and Comptroller to take charge of these effects. On the 9th of the following month, the Legislature passed an act directing the Governor, Secretary of State and Comptroller "to employ such agencies as they may deem necessary for the purpose, to investigate into the assets of the Bank of Tennessee, and to ascertain and schedule the amount and value thereof." Under this act, each of these officers selected an agent to examine the effects which had been received, and schedule the same. These agents did together make the examination and inventory, which inventory was submitted by the Governor to the Legislature and ordered to be printed by that body. Afterwards, by act of the Legislature, passed in 1866, the effects were directed to be turned over to the newly appointed President and Directors of the Bank of Tennessee, and this was done in March, 1866. On the 11th of April, 1866, Eli Odom, plaintiff's intestate, presented to the President of the

Bank an affidavit that in 1861, he had made a special deposit in the Bank of Tennessee of a tin case containing 103 bonds of the county of Sumner, of $1,000 each, and five bonds of the same county of $100 each, all issued to the Louisville and Nashville Railroad Company; also of an envelope containg three bonds of the same county of $1,000 each; also of the same or different envelope, containing three State bonds for $1,000 each, of the issue of 1861. At the foot of this affidavit, on the 18th of April, 1866, he gave the Bank of Tennessee a receipt for the tin case containing the 103 bonds "described in the foregoing affidavit," also three bonds of $100 each, "the latter being Sumner county bonds." On the 30th of May, 1866, Odom made another affidavit, that in 1859, he had deposited in the Bank a tin case containing 103 bonds of $1,000 each, and three $100 bonds, "and an envelope containing three $1,000 Sumner county bonds, and 5 eight per cent. Tennessee State bonds, issued in June, 1861. The affidavit admitted the previous receipts of his tin case and its contents "as deposited." On the 31st of May, 1866, Odom gave, on the back of the affidavit, a receipt to the Bank of Tennessee for four of the State bonds "described in the affidavit," and on the 30th of July, 1866, a receipt for the fifth bond. On the 2d of December, 1869, he instituted this action of detinue for the three Sumner county bonds for $1,000 each, claimed by his affidavits to have been deposited in the Bank in an envelope. The suit was against Wm. G. Brownlow, S. W. Hatchett, E. E. Fletcher, Ex'r of A. J. Fletcher, de-

ceased, H. H. Thomas, Samuel Hunt, and Samuel Watson. Brownlow was the Governor of the State, Hatchett Comptroller, and A. J. Fletcher Secretary of State, when the assets of the Bank were turned over to the State authorities by the commander of the United States' army. Thomas and Hunt were two of the agents employed to examine and schedule the assets, and Watson was the new President of the Bank of Tennessee.

A declaration was filed in trover, to which the defendants pleaded not guilty. On the 26th of November, 1873, the plaintiff moved to amend his declaration by filing counts on the facts of the case, seeking to hold the defendants liable for negligence in safely keeping the bonds. The court refused the application, to which the plaintiff excepted. On the trial of the cause, the jury found a verdict for the defendants, and the plaintiff has appealed in error.

Before the trial, Odom died, and the suit was revived in the name of the plaintiff as his administrator. Evidence was introduced by him tending to show that his intestate had, in 1859 or 1860, deposited in the Bank of Tennessee, as a special deposit, a tin box containing 103 Sumner county bonds of $1,000 each, and a separate envelope containing three of the same bonds of $1,000 each. The printed schedule of the assets turned over to the State officers, shows one item as follows: "Tin case, containing 103 $1,000 bonds; also 3 $1,000 bonds, Louisville & Nashville R. Co., marked property of Eli Odom." The original schedule in writing is, however, produced and identified, which

described the three additional bonds as $100 bonds. The defendant Hatchett died before the trial, and before his evidence was taken, but the bill of exceptions contains the depositions or testimony of Brownlow, Thomas, Hunt, Watson and Hawkins, the last of whom was the third agent who examined the assets and made the schedule. The entire evidence leaves no reasonable ground to suppose that there was an actual conversion of the bonds sued for, by any of the defendants, either by appropriation to themselves or by delivery to others, or that such bonds ever came to the hands of either of the defendants. Under these circumstances, the record must show a very palpable error to justify the continuance of useless litigation by a reversal.

The first error relied on for reversal, is in the refusal of the Circuit Judge to allow the plaintiff to amend his declaration, upon the application made on the 26th of November, 1873. The practice in this State always has been to allow amendments at any stage of the cause, with a view to attain the ends of justice, when it can be done without prejudice to the opposite party; and the statutes, brought forward into the Code, section 2867, were only a legislative endorsement of the practice. *Beard* v. *Young*, 2 Tenn., 54. The same construction has been put upon the statute as upon the previous practice, that the amendments authorized are to promote the ends of justice, not to operate prejudicially to the opposing party. *Smith* v. *Large*, 1 Heis., 5. Accordingly, in a case where the time of the commencement of the action became important

in reference to the statute of limitations, the effect of an amendment changing the form of action was restricted to the time when the amendment was actually allowed, and the statute held to be a good defense. *Crofford* v. *Cothran*, 2 Sneed, 492. There are a number of cases in accord on the general principle. *Miller* v. *Taylor*, 6 Heis., 481 *Flatley* v. *Memphis & Charleston R. R. Co.*, 9 Heis., 235; *Lillard* v. *Porter*, 2 Head, 179. If, therefore, the amendment had been allowed in this case, the statute of limitations would have been a good defense to the new action, and the refusal of the Judge to allow the amendment cannot be treated otherwise than as a sound exercise of discretion.

The Circuit Judge charged the jury that the affidavits of Odom, which were introduced by the defendants, were not evidence of the truth of their contents, but merely evidence of the fact that he made the claims therein set forth. It is now insisted that the plaintiff was entitled to the benefit of these affidavits, as evidence to be looked at by the jury and weighed as other evidence.

If the affidavits had been introduced by the defendants as admissions made by the plaintiff, the rule contended for would apply. But it is clear they were only offered for the purpose of enabling the defendants to have the benefit of the plaintiff's receipts, which expressly refer to the affidavits for the description of the bonds received. In this view, the charge of the Judge was correct.

It is earnestly argued that the President of the Bank at the time of the removal of its effects south,

who continued to act as president until their seizure by the military forces, and who came back on the same train with the property, was the proper custodian, and the possession of the defendants unauthorized and a conversion. And in this connection, the Circuit Judge is charged with error in assuming as a fact, that in April, 1865, the States of Georgia and Tennessee were in a state of war, by reason of which fact the military seizure was operative. The argument is, that in this State at any rate there was a resumption of civil government. If this be conceded, the seizure was in Georgia, where military law alone prevailed. And even in this State, the effort to reinstate the State government was under the direction of the President of the United States as commander-in-chief of the armies of the United States. And it was not until long afterwards that the proclamation of the President restored this State and its citizens to their normal condition. The seizure or capture of the effects by the military, put an end to the control of the existing President of the Bank, and although he may have accompanied them on their return, the proof is clear that it was as a volunteer, not as one in authority.

The entire effects held by the officers of the Bank were treated by the military as captured property, and if, under these circumstances, these effects were turned over to the State of Tennessee through its highest executive officers, the officers would be clearly justified, as the Circuit Judge charged, in safely keeping them until the Legislature should direct what disposition

should be made of them. The delivery to the officers was for the State, and the State could authoritatively speak only through its Legislature. What would have been the effect of a willful refusal of the Legislature to act, or to act in a reasonable time, we need not stop to inquire, for the Legislature did act in a reasonable time, and in a just manner, and the plaintiff's intestate received, it is almost certain, all of his property which was actually received by the State from the military.

It is said that the resolution of the Legislature only authcrized the Governor, Secretary of State and Comptroller to take charge of the assets of the Bank of Tennessee, and the act of the Legislature only directed that they investigate such assets, and that this language would not include the special deposits of third persons. But this is entirely too narrow a view of the words used, and the intention disclosed. What was clearly meant by the assets, was the property captured by the military and proposed to be surrendered to the State. The plaintiff's intestate, and other special depositors, would have had a just right to complain if the State officers had declined to receive anything except what belonged to the Bank.

Neither simple asportation nor refusal to deliver on demand, necessarily establishes a conversion. Each is only *prima facie* evidence of conversion, and inoperative if it appear that there was really no intention to convert and no conversion. *Garvin* v. *Luttrell*, 10 Hum., 16; *Scruggs* v. *Davis*, 5 Sneed, 261. The officers of the State, in accepting the property of the

Bank from the military, who claimed it as lawful capture, were, under the circumstances, performing a public duty, and the act was not a conversion. They did not surrender the possession by employing agents to examine and make a schedule of the property. Nor were they guilty of a conversion by merely refusing to deliver special deposits upon demand, until the Legislature had been advised of the facts, and had a reasonable time to act. The Circuit Judge was, therefore, correct in giving the instructions which are chiefly complained of.

There is no error in the judgment, and it will be affirmed.

3L 724
15L 193

Brien & Woodard *v.* J. O'Shaughnesy.

1. Tax Sale. *Collector's deed.* A tax collector's deed is not void which fails to recite that in selling the land the collector pursued the statute by offering first to sell a less quantity than the whole to whoever would bid the amount of the taxes on the smallest number of acres.

2. Same. *Several lots sold as a whole.* A tax sale is not void because several town lots belonging to one owner, lying contiguous and forming one tract or body, were assessed, reported and sold as a whole instead of separately.

3. SAME. *Substitution of original for copy of collector's report.* The substitution of the original report of the collector for a copy, to accompany the order of sale, will not invalidate the sale.

4. SAME. *Return of order of sale.* The failure of the collector to make return of the order of sale in due time, as required by the statute, will not affect the right of the purchaser.

5. SAME. *Collector may make second deed with fuller recitals.* A deed by the collector made to the purchaser after the commencement of an action of ejectment, in confirmation of a previous deed, but containing fuller recitals, may be read in evidence, though it does not in terms refer to the first.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. N. BAXTER, J.

M. M. BRIEN, Sr., for Brien & Woodard.

A. L. DEMOSS for O'Shaughnesy.

MCFARLAND, J., delivered the opinion of the court.

This is an action of ejectment upon a tax title. There was judgment by default for want of a plea or defense within proper time, but upon cause shown the judgment by default was set aside and defense permitted, and upon final trial judgment for the defendant. The plaintiffs took a bill of exceptions, showing the ground upon which the judgment by default was set aside, and also a bill of exceptions to the proceedings upon the trial, and have appealed in error.

They insist, *first*, that the court erred in setting aside the judgment by default. But this was a matter within the sound legal discretion of the Circuit Judge. The application was made in good time, accompanied

by an affidavit explaining the failure to appear sooner, and showing an interest in the property and a reasonable ground to defend. The discretion of the court was properly exercised in favor of a trial upon its merits.

It is assumed in argument that the court below held the tax collector's deed, under which the plaintiffs claimed, void, because it failed to recite upon its face that in selling the land the collector pursued the statute by offering first to sell a less quantity than the whole to whoever would bid the amount of the taxes, etc., for the smallest number of acres.

The charge is somewhat ambiguous upon this point. It does appear at one point in the record, that the judge was inclined to so hold, and the charge argues to this conclusion and cites authorities to show that a purchaser taking a deed without such recital, is estopped to show that the sale was otherwise than as recited in the deed. If such be the proper construction of the charge—and it is susceptible to this construction—it is erroneous, as held by this court in the case of *Brien & Woodard* v. *Andrew Creighton*, MS.

It is argued, however, in behalf of the defendant, that even conceding this to be error, that there should be no reversal, because the court can clearly affirm that the sale was void and the plaintiffs got no title. We are, however, not prepared so to hold. The ground upon which mainly this holding is asked is, that the land consists of several town lots, and they were all assessed, reported and sold as a whole instead of separately. Lots or parcels of land belonging

to the same owner, lying contiguous, forming one tract or body, may be given in as a whole included in one valuation, Code, sec. 569, and as a result may be reported and sold as one tract is reported and sold. The charge of the Circuit Judge seems to hold the contrary. If the facts should bring this case within the above rule, the sale would in this respect be valid. The Code, section 627, provides, that to make the sale valid and communicate a good title to the purchaser it shall be sufficient: "That the land sold lies in the county in which it has been reported for non-payment of taxes, and is sufficiently described; that it has been duly reported; that an order of sale has been awarded; that the sale was duly advertised; and to establish these facts the collector's deed reciting their existence shall be *prima facie* evidence. No sale shall be invalid because the number of acres is not precisely given in the report, nor on account of any objection or informalities merely technical, but such sale shall be good and valid if the foregoing requisites are substantially complied with, whether the land be sold in the name of the true owner or not." Secs. 628, 629.

His Honor held that a failure to issue a *copy* of the collector's report to accompany the order of sale, as required by section 615 of the Code, was fatal to the sale; that the substitution of the original report of the collector in the place of a copy, would not suffice. He held further, that a failure of the collector to make return of the order of sale in due time, as required by the statute, was fatal. In both respects we think his Honor was clearly in conflict

with the plain letter of the statute, declaring what shall be sufficient, and that a substantial and not a literal compliance with the provisions of the statute is required. The issuance of the original report annexed to the order of sale instead of a copy, is a substantial compliance with the law. The objection is merely technical. The process is required to be returned as other *fieri facias*. Code, sec. 616.

It is settled that the title of execution purchasers of land is not to be affected by the failure of the sheriff to make proper return. *Mitchell* v. *Lipe*, 8 Yerg., 179. And it would be difficult to see why a more rigid rule should apply to a purchaser at a tax sale; in fact the same rule has been applied to a tax sale. *Barry* v. *Rhea*, 1 Tenn., 345.

It appears further that plaintiffs offered in evidence a second deed for the premises, made by the collector after the action was brought, founded upon the same sale, and similar to the first, except that it contains fuller recitals. His Honor, however, upon objection, refused to admit it in evidence. In this we think he again erred. See *Crockett* v. *Campbell*, 2 Hum., 411, and *Simmons* v. *McKissick*, 6 Hum., 259.

Deeds made in confirmation of previous deeds or acts, may be admitted, although made after action brought. While the last deed does not in terms refer to the first, yet it was in effect intended to be in confirmation of it, and the plaintiffs had the right to read it for that purpose.

For the errors indicated, the judgment must be reversed and the cause remanded for a new trial.

STATE OF TENNESSEE *v.* THOS. ATCHISON, N. B. BUCK, NASHVILLE BANNER PUBLISHING CO.

1. CRIMINAL LAW. *Libel. Corporation indictable.* A corporation may be indicted for libel.

2. SAME. *Indictment. Joinder of different persons in different counts.* An individual and a corporation may be joined in the same indictment for libel, in different counts, the subject matter being of the same nature, and admitting of the same plea.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. J. M. QUARLES, J.

ATTORNEY GENERAL LEA and A. S. COLYAR for the State.

JOHN FRIZZELL and T. L. DODD for defendants.

FREEMAN, J., delivered the opinion of the court.

This is an indictment for libel, quashed in the court below and appealed by the State. The indictment has two counts, the first against Atchison and Buck, the second against the Banner Publishing Co. The matter alleged is the same in both counts.

It is conceded, or certainly cannot be denied, that the publication is libelous, if it is published in the sense of the law of and concerning the individuals alleged. It is matter calculated to give those who read the charge an ill opinion of the party, and to lower their

standing in the community. A libel is defined by this court to be "injurious detraction of any one by writing, or equivalent symbols." *Williams* v. *Karnes*, 4 Hum., 11. The matter alleged here is, beyond question, of this character. It is insisted, however, that it is not sufficiently averred that the parties mentioned were the parties alluded to in the publication, and that it should have been definitely averred that they were known and recognized as the parties designated by the language used.

The artiele complained of, published in the Nashville Banner, is set out. It charges the existence of a "scoundrelly ring," a band of conspirators, who have defrauded, cheated, swindled, plundered and robbed, with other equally choice and vigorous denunciations.

Without quoting at length from the indictment, it suffices to say that it is clearly and definitely averred that these charges were intended to be and were applied to the parties mentioned. Whether under the former more stringent rules this would be sustainable, we need not now inquire. By sec. 5131 of the Code, it is enacted that "an indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled, of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published shall be established on the trial."

The averments of this indictment are unquestionably in compliance with the requirements of this section, and must be held good.

It is next objected that the joinder of two different counts against two different parties is error, for which the indictment should have been quashed. In the case of the *State* v. *Lea*, there was one count against Polly Bailey for perjury, and a second against Lea for subornation of perjury. The court say, "We are unable to perceive why these parties were not properly joined in the same indictment, and charged in seperate counts, though their offenses be distinct They were of the same nature, admitted of the same plea and same judgment. 1 Col., 177. So in this case, the offense is precisely the same—the same plea is appropriate. It is true the corporation may not be imprisoned, but the fact that the same measure of punishment cannot be inflicted in this way cannot vitiate the indictment, the judgment is of the same character, that is, a fine and costs. That imprisonment might possibly be inflicted in one case and not in the other, cannot in the least affect the validity of the indictment. The principle of such an objection is that joinder of different offenses might embarrass the parties in their defense. The fact that one could not be imprisoned after conviction, certainly can have no influence in the conduct of the trial on the question of guilty or not guilty.

We see no ground on which the judgment can be sustained, and reverse it, remanding the case for further proceedings.

W. W. Fairbanks *v.* Mary Hill.

Administration. *Husband. Right to administer on wife's estate.* The husband is entitled to administer upon the estate of his deceased wife.

FROM WARREN.

Appeal in error from the Circuit Court of Warren county. J. J. Williams, J.

F. M. Smith for Fairbanks.

E. W. Munford for Hill.

McFarland, J., delivered the opinion of the court.

This contest began in the County Court of Warren county between W. W. Fairbanks and Mary Hill, each claiming the right to administer upon the estate of Ann Lee Fairbanks, deceased, late of said county, said W. W. Fairbanks being the husband, and said Mary Hill the mother of the deceased. The county court decided in favor of the husband, granted him letters, accepted his bond, and administered the oath. Upon appeal the circuit court reversed the judgment and decided in favor of the right of the mother to administer. The right of the husband in this regard is perhaps as well settled as anything in the law, unless the law in this respect has been changed by legislative action. It is assumed that this was done by the act of 1859–60, T. & S. Code, sec. 2206a.

The act of 1815, providing that administration should be granted to next of kin, was repealed by being omitted in the adoption of the Code, so that the county court was at liberty to select either one of the next of kin, or a creditor, or the widow. See *Swan* v. *Swan*, 3 Head, 163.

The act of 1859–60 enacted "that when any person shall die intestate in this State, administration shall be granted to the widow of such person if she make application for the same; for want of such application on the part of the widow, administration is to be granted to the next of kin if they apply; if neither the widow or next of kin apply, then to the largest creditor," etc. His Honor, the Circuit Judge, was in error in supposing that this act was intended to deprive the husband of his well settled rights under the law to administer upon the estate of his deceased wife, and take in this mode her choses in action not previously reduced to possession by him. There was no purpose to change the law in this respect, although the language used is somewhat general.

The judgment of the circuit court will be reversed, and the judgment of the county court affirmed.

T. W. Evans v. John E. and Narcissa P. Saunders.

Contract. *Construction.* Under the assumption by the purchaser of land of "the payment of whatever taxes of every description that may be levied on said property legally for this present year, 1869," the purchaser is not liable for the payment of a succession tax which accrued three years before the purchase, and was assessed and collected two years afterward.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. N. Baxter, J.

H. E. Jones for Evans.

J. C. Malone for Saunders.

Cooper, J., delivered the opinion of the court.

On the 8th of February, 1869, John E. Saunders and Narcissa P. Saunders sold and conveyed by deed, with covenants of seisin, title and against encumbrances, to T. W. Evans, a lot in Nashville for the consideration of $5,808 in cash, "and the payment of whatever taxes of every description that may be levied on said property legally for this present year 1869." The lot had descended to the grantors as the heirs of a sister who died in 1866.

By the act of Congress of 1864, ch. 173, sec. 133, it was enacted "that there shall be levied and paid to the United States," in respect of every succession

of real estate, where the successor shall be a brother or sister, or a descendant of a brother or sister, a duty at a prescribed rate. By sec. 147, any person liable to pay duty in respect of any succession was required to give notice to the assessor of his liability, and deliver a true account of the succession.

This provision is re-enacted with some modifications by the act of 1866, sec. 184. No such notice and account of the succession of the lot in question seems to have been given. On the June list of the United States Assessor's book, on the 10th of July, 1870, the lot was entered for taxes and penalties for neglect to report, the amount assessed to each of the defendants being $102.66.

On the 7th of January, 1871, a warrant was issued by the United States Revenue Collector against the property and levied thereon, and Evans paid the money to prevent a sale. He brought this suit to recover the amount so paid. The circuit judge, who tried the case without a jury, gave judgment for the defendants and the plaintiff appealed in error.

It is conceded that the plaintiff is entitled to recover unless the taxes fall within those which he undertakes to pay in part consideration for the land. His agreement is to pay "whatever taxes of every description that may be levied on said property legally for the present year 1869." The circuit judge construed the words, "may be levied," as meaning might be collected, and as the succession taxes in question, although not assessed, actually accrued when the land descended in 1866, and might have been collected

during the year 1869, the plaintiff had bound himself to pay them.

We are unable to concur in this view of the contract. It makes the obligation equivalent to an agreement to pay all the taxes for previous years, for such taxes might, equally with the succession tax, be collected during that year if unpaid. It is obvious, however, that an agreement to pay all past taxes, as well as the taxes for 1869, would have been plainly expressed, not left to be inferred from the technical meaning of one word, "levied," and the strained construction of two others, "may be." Besides, the agreement is not to pay the taxes which may be levied *during* the present year, but *for* the present year. The plain meaning of the parties was to limit the liability of the grantee to the taxes for the year 1869. The word "levied" was used in the not uncommon sense, even in law books, of laid or assessed, and collected.

The judgment must be reversed, and a judgment rendered here in favor of the plaintiff for the taxes paid, with interest

31 737
9L 33

A. T. SPRINGER *et al.* *v.* WM. SMITH.

EXECUTION. *Levy. Legal title.* C., as a creditor, redeemed land sold by a trustee. After redemption, but before conveyance to C. by trustee, S. levied an execution against C. thereon. Held, the legal title not being in C. at the time of levy, no lien was thereby acquired.

FROM LAWRENCE.

Appeal in error from the Circuit Court of Lawrence county. J. V. WRIGHT, J.

ROSE & TINNON for Springer.

G. T. HUGHES for Smith.

DEADERICK, C. J., delivered the opinion of the court.

This is an action of ejectment brought by Smith against plaintiffs in error, who are heirs at law of Jacob Springer, deceased. Verdict and judgment were for plaintiff below, and defendants have appealed. Smith had judgments before a justice of the peace against W. B. Chaffin for about $800, and had executions issued and levied in October, 1865, upon the land in controversy, and papers returned to the circuit court for condemnation. Learning soon after the levy that the title to said land was not in Chaffin, and that his brother was tenant in common of the land with him, Smith, in March, 1866, filed his bill against said Chaffin and his brother.

At the November term, 1871, a decree was pronounced in this cause declaring Smith, by the levy of his executions, had acquired a lien upon an undivided half of said land, and directing the sale of Chaffiin's half. This sale was ordered at the February term, 1874, and the land sold in March, 1874, and Smith became the purchaser, and the clerk and master executed to him a deed in March, 1876, and this suit was instituted in March, 1877.

In the meantime, on the 19th of December, 1865, both the Chaffins sold and executed to Jacob Springer, ancestor of plaintiffs in error, a deed for the land. So it appears that between the time of the levy of Smith's execution on the land and the time of filing his bill, the Chaffins had made their deed to Springer, which was duly registered.

At the time of the levy of Smith's execution the title to the land was in one Caleb B. Davis, trustee. The land had been conveyed to Davis in trust by one King, in 1861, to secure debts to Miles Bentley. It was sold, purchased by Bentley, and ultimately redeemed by the Chaffins in 1863 as creditors of King, but they took no conveyance from the trustee who held the legal title until November 17, 1865, and Chaffin, as before stated, then conveyed to Springer on the 19th of December, 1865.

Upon these facts the court charged the jury that plaintiff claimed title under a levy on the land and condemnation thereof, and certain proceedings thereunder in chancery, and tells them that although as a general rule the execution can only be levied on the

legal title, still if all the money due upon the mortgage debt was in fact paid, the execution might be levied on the land.

Where it is stipulated in the mortgage or deed of trust that the conveyance is to be void upon payment of the debt secured to the mortgagor, it has been held that the legal title reverts to him who conveys, upon the happening of that event. But Chaffin never owned this land, or had any conveyance for it, until Davis conveyed it him in November, 1865. Having paid the redemption money, he had the right in equity to compel its conveyance. But he had no legal title thereto when it was levied on, and the levy of the execution thereon created no lien. We think, therefore, his Honor erred in charging the jury as indicated above.

The statute of limitations, or adverse possession, was relied upon by the defendants below. And we think the Circuit Judge also erred in his charge upon this point. He stated to the jury that plaintiff's right to sue did not accrue until his purchase at chancery court sale, and the confirmation of said sale, and that prior to that time the statute of limitations would not begin to run.

For these errors the judgment must be reversed and a new trial granted.

3L 740
4L 239
1pi 581

MARSHALL v. THRUSTON.

1. CONTRACT. *Dealing in futures. Intention of the parties make the contract lawful or unlawful.* A contract for the sale of State bonds, to be delivered at a future day, is valid, although the seller have not the bonds, nor any other means of getting them than by buying them in the market, if the parties intend that they shall be delivered and the price paid; but it is otherwise if the real intention of the parties be to speculate in the rise and fall of the price of the bonds.

2. SAME. *Same. Notes given for losses in speculation to agent or broker of losing party.* In a suit brought upon notes given for losses in speculations, by time contracts in public bonds, to a bank acting as the agent or broker of the losing party, the court charged in substance: "If the bank furnished defendant with money for the purpose of enabling him to engage in an unlawful undertaking, it could not recover the amount so furnished; but if the defendant employed the bank as his agent or broker to effect sales of bonds with parties in New York or elsewhere, and it was the intention of the defendant and such parties that no bonds should pass, and only the difference between the contract price and the market price at the time fixed for executing the contract should be paid to the one or the other as it happened, and the defendant sustained losses which the bank paid, and the defendant afterward gave the bank his notes for the amount so paid, the bank might recover the amount by action." Held, to contain no error of which the defendant could complain.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. FRANK T. REID, J.

A. S. COLYAR for Marshall.

J. C. BRADFORD for Thruston.

COOPER, J., delivered the opinion of the court.

The defendant in error, Thruston, as trustee of the

People's Bank, under an assignment for the benefit of creditors, brought this suit against the plaintiff in error on three notes executed by him to the bank, dated August 17, 1872, at eighteen, twenty-four and thirty months, with interest from date, for $860 each. These notes, with others which have been paid, were given by Marshall to the bank on settlement of certain transactions in buying and selling Tennessee State bonds on time during the years 1869, 1870 and 1871. Verdict and judgment were rendered in favor of the plaintiff below, and the defendant appealed in error.

The transactions in question constitute what is known as dealing in "futures," which is explained by the witnesses to mean that the party buys or sells so much of a given article, in this case bonds of the State of Tennessee, at a given price for delivery at a future day, depositing a "margin," or sum of money, to cover the possible rise or fall in the price of the article. At the expiration of the stipulated time there is a gain or loss in proportion to the rise or fall in price. Each party may, if there be no agreement to the contrary, demand a performance of the contract by a delivery of the article and payment of the price, although usually it seems no delivery is expected, but the transaction is closed by the payment by the loser to the winner of the difference between the price agreed and the actual market price at the time. Evidence was introduced on the trial by the plaintiff tending to show that the bank, as the agent or broker of the defendant, caused contracts to be made at New York with third persons in accordance with the de-

fendant's instruction, and paid the losses, and that the bank had no interest in the transactions except a brokerage commission of one-eighth of one per cent. on the amount of the sale or purchase. On the other hand, evidence was introduced by the defendant tending to show that contracts were not made with third persons through the bank, but with the bank as a principal; and, at any rate, if the bank acted as agent, it was with full knowledge that the transactions were not real but gambling wagers, and advanced the money to enable the defendant to engage in such transactions.

In view of the evidence there may be three theories of the relation of the bank and defendant throughout these transactions outside of the relation insisted upon by the plaintiff below. One is, that the parties knowingly dealt with each other as principals; another is that the bank induced the defendant to believe that the transactions were real, when in fact no third persons were dealt with; and the third, that there were contracts made, through the bank as an agent, between the defendant and third persons, which, however, were understood by both of the latter to be mere wagering contracts, without any intention to demand or deliver the bonds.

The Circuit Judge, upon issues joined which brought the legality of the transactions squarely in question, charged the jury upon each of these aspects of the transactions. He said to them in substance, "A contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go the

market and buy them. But such a contract is only valid when the parties really intend that the goods are to be delivered by the seller and the price paid by the buyer. If, under the guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the dates fixed for executing the contracts, then the whole transaction constitutes nothing more than a wager, and is illegal and void." If, he added, the defendant and the bank were engaged as principals in a pure speculation in the rise and fall of the prices of Tennessee bonds, and the notes in suit were given to secure the amount of losses sustained by the defendant in the adventure, the law will refuse to aid in their collection. If there were in reality no parties in New York with whom the bank contracted as the defendant's agent for the sale or purchase of bonds, and defendant and the bank both intended to speculate in the rise and fall of prices, neither intending to demand or make delivery of the bonds, then the contracts were against public policy and void; and if the notes were given in satisfaction of losses thus sustained by defendant in carrying out such contracts, they cannot be enforced.

To this extent the charge is conceded to be substantially in accord with authority and correct. *Watkins* v. *Frierson*, MS. opinion of Judge McFarland at the present term; *Grizewood* v. *Blanc*, 11 C. B., 526;

Hibblewhite v. *McMorrin*, 5 M. & W., 462; *Bigelow* v. *Benedict*, 70 N. Y., 202.

On the third aspect of the relation of the parties under the defendant's proof, the judge charged the jury: "If you find that the relation between defendant and the bank was that of principal and agent, and that defendant was the principal, and employed the bank as his agent and broker to effect sales of Tennessee bonds on his behalf with parties in New York or elsewhere, although it may have been the intention of defendant and the party in New York that no bonds should pass or change hands, but on the contrary, the difference between the contract price and the market price of the bonds at the date fixed for executing the contract, should be paid by the one or the other as they happened to lose; in other words, although the contract between the two principals may have been a pure speculation in the rise and fall of prices, and therefore illegal and void, yet if, under such a contract, the defendant sustained losses, and the Peoples Bank, at his request, paid the amount of such loss, or if the bank paid such losses without being requested, and defendant afterward ratified their action and gave his notes for the amount so paid, such amount can be recovered of him in this action." His Honor adds, "If the Peoples Bank furnished defendant with money for the purpose of enabling him to engage in an unlawful undertaking, it could not recover of him the amount so furnished."

We understand the charge to be in substance that if the bank knowingly assisted the defendant by an

advance of money and active agency, though not as principal, to gamble in the rise and fall of bonds, no recovery can be had; but if the bank merely acted as his agents in effecting contracts between him and third persons for the sale or purchase of bonds on time, the defendant and third parties intending to speculate in the rise and fall of prices, and defendant suffered losses which were paid by the bank, and these payments were made at his request, or subsequently ratified by him by the execution of his notes for the amount, a recovery could be had. In this view the charge seems to be in accord with the authorities, and is certainly unexceptionable so far as the plaintiff in error is concerned. *Smith* v. *Bouvier*, 70 Penn., 325; *Brown* v. *Speyers*, 20 Gratt., 296; *Ramsey* v. *Berry*, 65 Me., 570; *Warren* v. *Hewitt*, 45 Ga., 501; *Lehman* v. *Strossberger*, 2 Woods, 554.

The defendant's counsel, both by not asking for more specific instructions, and by their argument in this court, seem to concede this view of the charge. Their argument now is that knowledge on the part of the bank of the nature of the transactions, in the events supposed, would make it so far an aider and abetter in the gambling, that the notes subsequently given would not be valid without a new consideration. They cite *Bates* v. *Watson*, 1 Sneed, 376; *Lea* v. *Collins*, 4 Sneed, 394; *Johnson* v. *Byerly*, 3 Head, 194. But these cases only hold that money lent for the express purpose of accomplishing an illegal object, and applied by the borrower to that purpose, cannot be recovered, and that a subsequent promise having no

other support than the original loan, will not be sufficient to sustain a recovery. But the court say, in the first of these cases, that the test, whether a demand connected with an illegal transaction can be enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his claim. In the case supposed by the Circuit Judge in that part of his charge now under consideration, he tells the jury that if the money was advanced by the bank for the purpose of enabling the defendant to engage in the illegal transactions, there can be no recovery, and it is only upon the ground of a subsequent advance of the money to pay the losses incurred, the money advanced being the consideration, that a recovery can be had. In this view it is clear that the demand of the bank, although connected with the illegal transactions, can be enforced without any aid from the transactions. The transactions created the necessity for the money, and were the occasion of the loan, while the demand is based on the loan of the money after the contracts had been executed. *Armstrong* v. *Toler*, 11 Wheat, 258; *Planters Bank* v. *Union Bank*, 16 Wal., 500; *Jones* v. *Davidson*, 2 Sneed, 448; *Ohio Ins. & Tr. Co.* v. *Merchants Ins. & Tr. Co.*, 11 Hum., 1; *Faikney* v. *Reynous*, 4 Burr., 2069. Mere knowledge of the fact that money was borrowed to be used for an illegal purpose will not defeat the right of recovery. *Puryear* v. *McGavock*, 9 Heis., 461.

The evidence in this case does not so largely pre-

ponderate, if it preponderates at all, in favor of the plaintiff in error as to justify this court in interfering with the verdict of the jury. And there being no error in the charge, the judgment must be affirmed.

3L 747
4L 359
13L 95

S. M. JONES *v.* JOHN C. BURCH.

BILL OF EXCEPTIONS. *Must be signed during the term.* A bill of exceptions made up during the term at which the case was tried, but not signed by the judge until after the adjournment of the term, cannot be noticed, although the judge neglected to sign it through oversight.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. FRANK T. REID, J.

S. J. HENDERSON for Jones.

H. E. JONES for Burch.

COOPER, J., delivered the opinion of the court.

This case having been put on the easy docket, the plaintiff in error suggested a diminution of the record, and a *certiorari* for a more perfect record was awarded.

The defect consisted in the fact that the bill of

exceptions was not signed by the judge, although there was an entry to the effect that at the term at which the case was tried the defendant below, who is now the plaintiff in error, had tendered his bill of exceptions, "which being signed and sealed, was ordered to be made part of the record." The suit was tried at the September term, 1878. The clerk makes return to the *certiorari* that the bill of exceptions is now signed as of the date of the 18th of February, 1880, with the following statement by the judge: "I have signed the foregoing bill of exceptions this the 18th of February, 1880, for the reason that through oversight I neglected to sign it at the time it was tentered to me, which was sometime during the term at which the case was determined."

Strictly speaking, this memorandum cannot be noticed. It forms no part of the bill of exceptions or of the record of the cause. To have made what was done a part of the record, there should have been an application to the Circuit Judge in open court to amend the record, and an entry upon the minutes of the court of his judicial action. *Mellish* v. *Richardson*, 1 Cl. & Fin., 224. If, however, it can be looked to, the question is squarely raised whether a judge can, after the term at which a case was tried, sign a bill of exceptions prepared and presented at that term, and not signed through oversight. It has been long settled that a bill of exceptions cannot be made up after the term. *Ferrell* v. *Alder*, 2 Swan, 77; *McGavock* v. *Puryear*, 6 Col., 34; *Girdner* v. *Stephens*, 1 Heis., 280, 290. Nor can it be afterward

amended. *Steele* v. *Davis*, 5 Heis., 75. A bill of exceptions cannot be noticed if not signed, although the record recites that it is signed and sealed. *Garrett* v. *Rogers*, 1 Heis., 321. And the very point raised in this case seems to be decided in *Hill* v. *Bowers*, 4 Heis., 272, where the judge who delivers the opinion of the court says that a bill of exceptions, signed after the expiration of the term at which the cause was heard, cannot be noticed upon appeal to this court. It is thought best to adhere to this rule of practice, and to requíre parties to see that the bill of exceptions is perfected during the term at which the proceedings are had.

There being no bill of exceptions which can be noticed, the judgment must be affirmed.

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2. *Same. Same. Semble:* Such a judgment is exclusively under the control of the clerk, and no attorney, except one recognized by him as entitled to act, unless indeed it be an attorney representing all the parties beneficially interested, can be allowed to interfere with the execution so as to protect the officer. *Id*

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4. *Same. Same. Proceeds of realty sold, a trust fund.* The proceeds of land sold under the decrees in such a cause constitute a trust fund for the benefit of all the creditors ratably, which trust will follow the fund into the hands of any creditor who is a party or *quasi* party, and the trust may be enforced by the court, in a summary way, by ordering the creditor to pay the money in excess of his ratable share into the court within a given time, otherwise that execution issue. *Id.*

5. *Same. Creditor holds excess of his pro rata in trust.* Where funds thus derived from the sale of realty are ordered to be paid to the administrator, "for the purpose of paying off the indebtedness of the estate," without more, the administrator can only pay out the funds according to law, that is, ratably among all the creditors, and if he do in fact pay one creditor more than his share, the creditor will hold the excess in trust for the other creditors. *Id.*

6. *Same. A surety may file claim. When.* A surety against whom judgment has been rendered may, at any time thereafter, and within two years from the payment of the money, come into a suit filed for the administration of his principal's estate as insolvent, and, before the distribution of the funds, have the amount of the judgments allowed in his favor as a claim against the estate. *Id.*

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2. *Bond. Justice's judgment.* A motion to dismiss an appeal from a justice's judgment because the appeal bond was not accepted within the time prescribed by law, was properly sustained where the papers, filed on the first day of the next term of the circuit court, were endorsed by the justice, "returned without bond," although a bond dated as of the day of the filing be among the papers. *Chapman* v. *Howard*, 363.

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4. *Will not lie from action of Circuit Judge requiring County Trustee to give new bond or vacating the office. Not a judicial proceeding.* The action of a circuit judge, under sec. 778 of the Code, based upon the report of a grand jury, requiring a county trustee to give new bond, and declaring his office vacant because, in the opinion of the judge, the sureties to the bond, tendered in compliance with the order, are not good for the amount, is not a judicial proceeding from which an appeal or writ of error lies directly to the Supreme Court. *W. A. Knight Ex parte*, 401.

5. *Void Proceedings Remedy by certiorari. Dicta* per McFarland, J. If the proceeding be such a departure from the provisions of the statute as to render it void, the remedy is by *certiorari* from the circuit court; but if the proceeding is merely erroneous, there is no remedy. *Id.*

6. *From a Decree. Rights of parties who do not appeal.* Under the provisions of the Code, secs. 3155, 3159, if a decree adjudges independent rights, it will remain in force as to those parties who do not appeal, and be vacated as to other parties who do appeal, and *e converso* where the proper decree will necessarily affect the parties who have not appealed, the appellate court will determine the whole case as it stood before the hearing below, although an appeal be taken only by one party. *Parsons* v. *Kinzer*, 342.

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See ACTION, 1; CHANCERY PLEADINGS AND PRACTICE, 13, 16.

AWARD.

Arbitrators. Relationship to parties interested. Case: O. executed a mortgage upon a house and lot to F. to secure him as his surety. Afterward the railroad run through said lot, and the question of damages was submitted by O. and the R. R. Co. to arbitrators, who awarded damages. The arbitrators were related to F., which fact was known to the R.R. Co., but they had no *actual* knowledge of the mortgage on the lot to F. Upon a bill filed by F. seeking to appropriate the sum awarded as damages, and upon cross-bill by the R. R. Co. impeaching the validity of the award, held, that the award should be set aside. Arbitrators should be free from interest or relationship in all cases, unless such disqualifications are waived by the parties. *Stephenson* v. *Oatman*, 462.

BANKRUPTCY.

Assignee may sue in State Courts. An assignee in bankruptcy may sue in the State courts to recover the assets of the bankrupt. The State courts thereby assume no jurisdiction under the bankrupt act, but simply exercise their ordinary jurisdiction in suits between parties. *Barton* v. *Geiler*, 296.

BANKS.

National. Usury. A bill to recover usury cannot be maintained against a National Bank. It is not subject to the laws of the State upon that subject, except so far as Congress may see proper to permit. *Hambright* v. *The Cleveland National Bank*, 40.

BANK OF TENNESSEE.

See PLEADINGS AND PRACTICE AT LAW, 4.

BILL OF EXCEPTIONS.

Must be signed during the term. A bill of exceptions made up during the term at which the case was tried, but not signed by the judge until after the adjournment of the term, cannot be noticed, although the judge neglected to sign it through oversight. *Jones* v. *Burch*, 747.

BILLS AND NOTES.

See ACTIONS, 4.

Debtor. Creditor. His duties in reference to collaterals. Negligence. Case: R. was indebted by account to B., not having the money to pay he

BILLS AND NOTES—*Continued.*

endorsed to B. a draft on C., due in thirty days, the proceeds to be credited on his account. The draft was not presented at maturity, and shortly thereafter C. became insolvent. Held, that B. cannot maintain suit against R., either on the original debt or the draft. There was such negligence on the part of the creditor as injured and released the debtor. He cannot impose upon the debtor the loss which was occasioned by his own neglect while controlling or having the right to control the draft. *Betterton* v. *Roope*, 215.

BONDS.

See ACTIONS, 1; APPEAL, 4; CLERK AND MASTER, 1; EVIDENCE, 3; PARTNERSHIP, 2; REPLEVIN; SUMMARY PROCEEDINGS, 2.

BURDEN OF PROOF.

See EVIDENCE, 7.

CERTIFICATE OF STOCK.

Assignment. Valid against creditors without notice to the corporation. An assignment or transfer of a certificate of stock in a corporation, whether as collateral or in case of absolute sale, in the absence of any legislative enactment, passes the title to the assignee and is valid against the creditors of the assignor without transfer upon the books of the company or notice to the corporation. *Cornick* v. *Richards*, 1.

CERTIORARI AND SUPERSEDEAS.

See JUDGMENTS, 2; APPEAL, 5.

1. *Liability of securities on bond. New judgment. Lien of levy upon land.* Upon the dismissal of a writ of *supersedeas*, granted upon a petition to the circuit court to supersede and quash an execution from said court which had been levied upon petitioner's land, a judgment may be rendered against the petitioner and his security upon the *certiorari* and *supersedeas* bond, and also an order of sale of the land levied upon. The lien on the land acquired by the levy of the execution improperly superseded is still in force, and can be maintained notwithstanding the new judgment. *Littleton* v. *Yost*, 267.
2. *Costs.* In this case the facts developed that a portion of the judgment had been paid, but inasmuch as the whole execution was superseded the petitioner was liable for costs. *Id.*

CHANCERY COURT.

See DEED OF TRUST, 2; CONSTITUTIONAL LAW, 6.

CHANCERY PLEADINGS AND PRACTICE.

See ADMINISTRATION, 3; HOMESTEAD, 6; COMITY OF STATES, 2.

1. *Administration. Receiver. Supersedeas.* An order of a Chancellor, made in the progress of a cause, involving the administration of an

insolvent estate, appointing a receiver to take the assets out of the executor's hands, upon its being made to appear to the Chancellor that the assets are in danger of being lost or wasted, is within the power of the Chancellor and cannot be superseded by this court, under section 3933 of the Code. *Roberson* v. *Roberson*, 50.

2. *Bill to enjoin trespassers. Possession must be bona fide.* A party suing to enjoin trespassers, claiming to be in exclusive possession of a tract of land, must occupy and hold it *bona fide*, and by such use as is usual, and the land susceptible of. *King* v. *Malry & Henry*, 237.

3. *Not being in possession, must show title.* Not being in possession, such a party must show a connected chain of title in order to sustain his prayer for an injunction. *Id.*

4. *Boundary lines. Acquiescence.* Long claim of a certain line openly by a party, and acquiescence, in this case from twenty-five to forty years, by adjoining land owners, will fix the boundary at the line thus practically located, and enable a party having title to the land thus claimed by himself and those under whom he holds, to sustain a bill to enjoin a trespasser, and protect himself from any one not having superior title. *Id.*

5. *Fraudulent transfer of property. Administration.* A creditor of a deceased debtor may file a bill against a fraudulent grantee of the latter to reach the property conveyed, without first obtaining a judgment on his debt or proceeding against the property of the estate. *Armstrong & Dunlap* v. *Croft*, 191.

6. *Statute of two years and six months.* To such a bill, a plea by the fraudulent grantee that the creditor had not brought an action on his demand within two years and six months from the qualification of the personal representatives, is no defense. *Id.*

7. *Jurisdiction to aid judgment creditor.* Equity has jurisdiction to aid a judgment creditor in removing embarrassments in the way of a sale, so as to prevent a sacrifice of the property, either by suspending the sale until the obstacle is removed, or selling the entire property, and disposing of the proceeds of sale among the parties entitled. *Kerr* v. *Kerr and Humbard*, 224.

8. *Presumption in favor of pleader in motion to dismiss.* In this State the presumption is in favor of rather than against the pleader on motion to dismiss. *Id.*

9. *Jurisdiction. Sale of land for taxes.* The State, County of Davidson and city of Nashville joined in a bill to enforce their lien for taxes on a piece of property from year to year. Each year tax sales were had at which, for want of other bidders, complainants' officers bid in the property for the amount of the tax, costs, interest, etc. The bill prays for an account and for a sale of the property free from redemption. Held:

CHANCERY PLEADING AND PRACTICE—*Continued.*

1. That such a bill is not multifarious.
2. That the State, county and city may file such a bill in their own name without the intervention of any commissioner or other officer.
3. That the chancery courts have inherent jurisdiction to enforce the lien created by the act of 1813, ch. 98, carried into the Code secs. 554 and 555.
4. That this jurisdiction does not depend upon any act of the Legislature, but is inherent, and that chancery courts were not deprived of such jurisdiction by the Commissioner's Acts of 1872–73.
5. That it is doubtful whether those acts were intended to have general effect, or whether they only applied to taxes prior to their passage.
6. That no good reason is to be seen why sec. 9 of the act of 1875, ch. 81, which re-enacts the lien and declares it to be *enforceable as other liens*, should not be construed as express statutory authority for resorting to any remedy that the law allows.
7. That a statute creating a new remedy without expressly repealing the old remedy, is merely cumulative, and will not deprive a court of its jurisdiction to enforce the old remedy.
8. That the provisions of sec. 4489 of the Code are general, and give the chancery court the power to sell on a credit so as to cut off the equity of redemption in all cases where the specific land to be sold is mentioned in the decree, and that this is not an ordinary statutory tax sale, but the enforcement of the lien for taxes, and that the decree for sale free from redemption and on time was proper.
9. That complainants are entitled only to the costs up to and including the condemnation in the circuit court.
10. That the Chancellor did not err in disallowing all penalties, the penalty prescribed by the act of 1873 being repealed by the act of 1877, and that he did not err in refusing to allow ten per cent. interest claimed by complainants under the Acts of 1875.

10. *Averments of bill must be specific.* Bill alleging irregularities in the issue of bonds to a Railroad Company, should point out specifically such irregularities to call attention of the defendants to them and advise them of what they are to defend or explain. *Mathews* v. *Blount Co.*, 220.

11. *Creditor's Bill. Return of nulla bona.* The defense that in order to sustain a judgment-creditor's bill, under the Code, section 4282, *et seq.*, it is necessary to show the return of an execution on the judgment unsatisfied in whole or in part, if it be a defense at all, is to the jurisdiction, and waived by answer. *Turley* v. *Taylor*, 171.

CHANCERY PLEADING AND PRACTICE—*Continued.*

12. *Bill in name of the State. Attorney General a necessary party. When.* The Attorney General is a necessary party complainant to a bill filed in the name of the State, on the relation of a third person, to test the title of a Circuit Judge to the office under the Code, section 3409 *et seq.* *State* v. *McConnell*, 332.

13. *Enforcement of attorney's lien. Administrator not a necessary party.* An administrator is not a necessary party to a bill filed by an attorney to enforce a specific lien on land for professional services. *McCamy* v. *Key*, 247.

14. *Same. Non-resident. Affidavit.* A bill to enforce such lien against a non-resident is not required to be sworn to. The affidavit as to the non-residence of defendant may be before the master at rules. *Id.*

15. *Exhibits.* The practice of making records in other cases exhibits to a bill will not be allowed. If the record of former cases contain any material fact it should be stated. *Ramsey* v. *Temple and Patterson*, 252.

16. *Act of* 1877, *ch.* 97, *construed. Unliquidated damages.* If the act of 1877, ch. 97, extending the jurisdiction of the chancery court to all civil causes "except in injuries to persons, property or character," involving unliquidated damages, be constitutional, it must be strictly construed. It is, therefore, held that a bill in equity to recover damages of an attorney for ordering an execution held up, whereby the amount of the judgment was lost, cannot be maintained upon demurrer that the remedy was at law. *Id.*

17. *Same. Statute of limitation.* If such a bill could be maintained, the statute of limitation of six years would bar a recovery in this case. *Id.*

18. *Jurisdiction. Injunction bond. Damages.* The chancery court has jurisdiction to inquire and fix the damages resulting from the wrongful suing out of writs of injunction, and upon a reference as to damages the securities upon the injunction bond may plead *non est factum*, or any other legal defense that would be proper in an action at law upon the bond. *Henley* v. *Cliborne*, 213.

19. *Burden of proof.* Upon a plea of *non est factum* the burden of proof is upon the party insisting upon the validity of the bond. *Id.*

20. *Persons of unsound mind. Suit by next friend.* A bill may be filed in the name of a person of unsound mind by next friend, either before or after inquisition, if there be no committee or guardian. *Parsons* v. *Kinzer*, 342.

21. *Lien on live chattel. Sale in advance of final hearing.* Under a bill filed to enforce an alleged lien on a live chattel which remains in possession of the defendant, the court has no power, upon motion of the complainant, to order a sale of the chattel in advance of the final hearing, upon the ground that its value may otherwise be lost to the complainant. *Stewart* v. *Lore*, 374.

CHANCERY PLEADING AND PRACTICE—*Continued.*

22. *Necessary parties.* In a bill by the brother and sisters to sell land, the children of the testator being entitled to the surplus after payment of special legacies, are necessary parties. *Browder* v. *Jackson*, 151.

23. *Taking Accounts.* By the settled rule of Chancery practice, the parties are required to furnish the clerk with their respective accounts of the matters of reference, from which he can see the points of difference, and limit the evidence to those points. *Myers* v. *Bennett*, 184.

24. *Partnership. Balance Sheet.* Where a partnership account is ordered, each partner is an actor, and unless all the parties join in employing a competent accountant to make out a balance sheet of the business with proper schedules, should be required to furnish his own statement of the account. *Id.*

25. *Partnership Books. Should be examined by experts.* Partnership books, to which each party has had access, are *prima facie* evidence as between the partners, but the partners cannot, in lieu of the statement required, put in their general books of accounts, consisting often of immense folios, which neither the clerk nor the court can be required to examine. It is the duty of the parties to have them examined by experts, to ascertain what they do show, and to extract from them, in the form of balance sheets and schedules, such general statements, and such specific facts as may tend to elucidate contested matters of charge and discharge. *Id.*

26. *Partnership. Foreign.* A creditor having attached a debt as due to his non-resident debtor, the money was paid into court, and the debtor put in a plea that the fund was not his property, but the property of a non-resident firm of which he was a member, whereupon the creditor filed an amended and supplemental bill against the members of the firm to ascertain the interest of the debtor in the fund, and the defendants moved to dismiss the bill upon the ground that the court had no jurisdiction of the person of the defendants. Held, that the motion was not well taken. *Semble*, the court would have jurisdiction to take an account of the foreign partnership, if necessary to ascertain the interest of the debtor in the fund. *Morrow* v. *Fossick*, 129.

CHOSE IN ACTION.

See MARRIED WOMEN, 2.

CLERKS.

See TAXES, 9.

CLERK AND MASTER.

1. *Bonds. Sureties. Liability.* The sureties upon the several bonds of a Clerk and Master signed the bonds at different times and places,

upon the meeting of the court several of them appeared before the Chancellor and acknowledged the same, others did not; *held*, that all were liable, those who did not acknowledge as well as those who did. *Buford* v. *Cor*, 518.

2. *Acknowledgment. Escrow.* After the acknowledgment of the bonds, the sureties thus acknowledging are precluded from the defense that the same was delivered as an escrow. *Id.*

3. *Special Commissioner.* Where a bond is executed by the Clerk and Master as special commissioner, the sureties are liable for any default as special commissioner, though the Clerk and Master was never appointed special commissioner by a general appointment or by decree in the several causes in which he has acted as such. *Id.*

4. *Sureties.* Where money or property came into the hands of the Clerk and Master by virtue of his official position otherwise than as commissioner or receiver, the sureties on his bond as Clerk and Master are liable. *Id.*

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COMITY OF STATES.

1. *Decree of divorce void. When.* Ordinarily the judgments and decrees of a sister State have full effect in this State, but in divorce cases either the husband or wife must be a *bona fide* resident of the State in which the proceedings are instituted, else a decree thus fraudulently obtained will be held null and void. Mere temporary residence will not confer jurisdiction. *Gettys* v. *Gettys*, 260.

2. *Jurisdiction. Pleadings and Practice in Chancery.* A sister State cannot be sued in the courts of Tennessee without her consent. But if she appears and submits to the jurisdiction of the court, she must abide the decree made on the original or amended bill. But the charges of facts in the amended bill must be germain to and have a connection with the original bill, and must be necessary to supply some defect or failure of statement of complainant's rights as therein set forth, otherwise a demurrer will be sustained to the amended bill for want of jurisdiction. *Tappan* v. *W. & Atlantic R. R. Co.*, 106.

COMPENSATION.

See WITNESSES.

CONTRACTS.

See MARRIED WOMEN, 1.

1. *Building Committee. Personal liability.* A member of the Building Committee of a Church will be personally liable for the value of articles furnished by the plaintiffs, sent to, received and used by him in the erection, if he agreed to pay the debt as one of the committee, without limiting the extent of his obligation. *Cruse & Adney* v. *Jones*, 66.

2. *Construction.* Under the assumption by the purchaser of land of "the payment of whatever taxes of every description that may be levied on said property legally for this present year, 1869," the purchaser is not liable for the payment of a succession tax which accrued three years before the purchase, and was assessed and collected two years afterward. *Evans* v. *Saunders*, 734.

3. *Dealing in futures. Intention of the parties make the contract lawful or unlawful.* A contract for the sale of State bonds, to be delivered at a future day, is valid, although the seller have not the bonds, nor any other means of getting them than by buying them in the market, if the parties intend that they shall be delivered and the price paid; but it is otherwise if the real intention of the parties be to speculate in the rise and fall of the price of the bonds. *Marshall* v. *Thruston*, 740.

4. *Same. Notes given for losses in speculation to agent or broker of losing party.* In a suit brought upon notes given for losses in speculations, by time contracts in public bonds, to a bank acting as the agent or broker of the losing party, the court charged in substance: "If the bank furnished defendant with money for the purpose of enabling him to engage in an unlawful undertaking, it could not recover the amount so furnished; but if the defendant employed the bank as his agent or broker to effect sales of bonds with parties in New York or elsewhere, and it was the intention of the defendant and such parties that no bonds should pass, and only the difference between the contract price and the market price at the time fixed for executing the contract should be paid to the one or the other as it happened, and the defendant sustained losses which the bank paid, and the defendant afterward gave the bank his notes for the amount so paid, the bank might recover the amount by action." Held, to contain no error of which the defendant could complain. *Id.*

5. *Minors. Void or voidable.* Whether contracts of infants are void or voidable, may be thus determined: "When the court can pronounce the contract to be to the infant's prejudice, it is void—when to his benefit, as for necessaries, it is good—and when the con-

CONTRACTS—*Continued.*

tract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant." *Swafford* v. *Ferguson*, 292.

6. *Void without consideration. Damages. Minors.* A father and two minor sons were injured by a turnpike being out of repair. A compromise was made by some of the stockholders and the father, and a written instrument executed to the father, agreeing on the part of the company to pay the father the sum of $2,500 "in full of all claim for damages against said company" on the part of the father and his two sons. Held, no recovery could be had on this instrument. It was without consideration so far as the damages due the minors were concerned, and it being impossible to separate them from the damages which might be due the father, the contract being one, no legal obligation existed. *Green & Fitzhugh* v. *Perkins and Claybrook*, 491.

CORPORATION.

See CERTIFICATE OF STOCK, 1; TAXES, 7.

CONSTABLE.

See SUMMARY PROCEEDINGS, 1.

CONSTITUTIONAL LAW.

1. *Act Construed.* Act of 1879, ch. 127, "to establish a Chancery and Law Court at Bristol, in the county of Sullivan," is constitutional. *Morrell* v. *Fickle*, 79.

2. *Acts of Legislature. Subject and title.* Art. 2, sec. 17, of the Constitution, prohibiting laws from being passed which embrace more than one subject, that subject to be expressed in the title, and providing that all acts which repeal or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended, is to be liberally construed, otherwise useful legislation would be unnecessarily embarrassed. *Id.*

3. *Repeal of former laws.* If the Legislature pass an act repealing a law, without receiting in its caption or otherwise, the title or substance of the law repealed, and a subsequent act is passed at the same session and within a few days of the same time of the first act, repealing the law which was attempted to be repealed by the first act, the two acts may fairly be supposed to have been in the minds of the legislators at the same time, and will be regarded as parts of the same legislation, and upon the passage of the last act, removing the constitutional objection to the former, it becomes valid in all respects. *Id.*

4. *Act creating Judicial Circuit.* Under an act entitled an act to create and establish a new judicial district, a change in adjoining circuits by detaching one county from one of these circuits and attaching

it to another, is sufficiently germane to the object as to be embraced in the caption as one subject, under the Constitution, Art. 2, sec. 17, and the positive provision takes the act out of that class of cases intended by that part of the same section of the Constitution which relates to "acts which repeal" former laws. *State* v. *McConnell*, 332.

5. *Constitution, Art. 2, Sec. 18. Failure of Journals to show all the readings of an Act.* The mere fact that the Journals of the Senate fail to show the second reading of a bill, will not affect its validity as an act, when it appears that it was passed on three several readings in the House of Representatives, and two readings in the Senate, one of them purporting to be the third reading, at which time it was passed with all the requisite formalities, and that it was signed by the Speaker of each House in open session, and approved by the Governor, in accordance with the requirements of the Constitution, Art. 2, section 18. *Id.*

6. *Chancery Courts. Increased Jurisdiction.* The Act of the Legislature, passed March 23, 1877, conferring jurisdiction on the chancery courts of "all civil causes of action now triable in the circuit court, except for injuries to person, property or character, involving unliquidated damages," is constitutional. *Jackson, Morris & Co.* v. *Nimmo & Thornhill.* 597.

7. The act of March 18, 1875, entitled "An act to enable old counties from which fractions have been taken to form new counties, to appoint tax assessors for said fraction, and to collect taxes therein," is constitutional. *Matthews et al.* v. *Blount county & Thomas.* 120.

8. *Witness fees.* The act of 1879, ch. 40, to prohibit speculation in witness fees, is constitutional. *Davis* v. *The State*, 376.

CONVEYANCE, VOLUNTARY.

See MORTGAGE, 2.

COSTS.

See CERTIORARI AND SUPERSEDEAS, 2; ELECTION; SUMMARY PROCEEDINGS, 5; TAXES, 9; WARRANTS; WITNESSES.

1. *Clerk's Fees.* The clerk is not entitled to pay for "an order for *capias* to issue." The law makes it his duty to issue a *capias* upon the return of an indictment or presentment, if the defendant is not in custody. *Thomas Lancaster* v. *The State.* 652.

2. The clerk is entitled to only one fee "for presentment or indictment, charging prisoners and pleas." *Id.*

3. *Witness Fees.* The clerk will not tax the attendance or mileage of any State witnesses who do not prove their attendance in *open* court by oath, that he has not directly or indirectly procured himself to be

COSTS—*Continued.*

summoned, that he was legally summoned on behalf of the State, and has verily attended the number of days claimed. *Id.*

4. The attendance of witnesses not legally summoned, cannot be taxed.

5. *Same. Costs when judgment is rendered on summons, and attachment is bad.* The judgment rendered on the service of a warrant or summons may be good, although the attachment may be quashed for fatal defects, in which case the costs of the recovery and the costs of the attachment will be severally borne by the unsuccessful party. *Doughty* v. *Kellum*, 643.

COURT, CIRCUIT.

See SUMMARY PROCEEDINGS, 3.

COUNTY COURT.

Personal liability of members for nonfeasance. The members of a county court are not liable to the State for loss of public revenue resulting from their failure to take bond from the revenue collector, before allowing him to collect revenue. *State* v. *Goddard, Elliott & Conner.* 99

COUNTY WARRANTS.

Not negotiable and do not bear interest. A county warrant, although made payable to a person named or order, is not a negotiable instrument, nor does it bear interest after demand of payment. *E. C. Camp* v. *Knox county.* 199.

CRIMINAL LAW.

See TAXES, 7.

1. *Brass Knucks.* Brass knucks is used in the statute as the name of a weapon, without reference to the metal of which it is made. *Patterson* v. *The State.* 575.

2. *Change of Venue.* Upon application to change the venue in a criminal case, the judge may call witnesses to prove that a fair and impartial trial may be had in the county. He is not compelled to take the affidavits presented with the application, nor confine his examination to those witnesses, but may call witnesses from different parts of the county and examine them to satisfy him as to the propriety of the change. *Porter* v. *State.* 496.

3. *Continuance. Affidavit.* If a continuance is refused upon an affidavit alleging sufficient grounds for a continuance, but upon the trial it is made to appear that the affidavit was false, this court will not reverse. *Id.*

4. *Druggist. Physician's prescription.* A regular licensed druggist has the right to sell malt liquors upon the prescription of a regular

practicing physician, but the selling or giving spirituous, vinous or malt liquors, except upon the prescription of a regular practicing physician, subjects the offender to the penalties prescribed by law for selling liquor without license. *Harper* v. *State.* 211.

5. *Same. Same.* If the prescription be a subterfuge to evade the law, the druggist, physician and buyer are liable to indictment or presentment. *Id.*

6. *Indictment. Clerical mistake.* A clerical mistake in the date of the passage of a statute in the recitals of an indictment for a misdemeanor is no ground for the arrest of judgment after conviction, the offense being otherwise sufficiently described, and the recital of the act unnecessary. *Harris* v. *State.* 324.

7. *Indictment. Selling liquor near an election ground.* An indictment against A. & B., partners, trading under the name of A. & B., will be treated as against the parties individually. *State* v. *Powell.* 164.

8. *Same. Same.* An indictment which alleges that the defendants "did unlawfully keep open their liquor shop within one-half mile of an election ground," is sufficient, and it is a matter of fact for the jury whether the place was near an elsction ground. *Id.*

9. *Same. Same.* It is sufficient to charge that it was on election day, without stating that an election was actually opened and held. If no election was held, this would be a matter of defense. *Id.*

10. *Grand Jury. Inquisitorial Powers. Institutions of Learning.* The Grand Jury have inquisitorial powers in case of selling liquor within four miles of an incorporated institution of learning. *State* v. *Staley,* 565.

11. *Technichalities.* The day for escaping the consequences of crime on mere technicalities, not going to the protection of essential right, has gone by, and violators of law had as well accept the fact and act accordingly. *Id.*

12. *Indictment.* The allegation in an indictment that "a more particular description is to the jurors unknown," cannot have the effect of dispensing with such description of the offense as will protect the defendant from a second prosecution for the same offense; but if a *particular fact* which is matter of description and *not vital* to the accusation cannot be ascertained, the indictment may charge that such fact is unknown to the jurors. *State* v. *Ferriss,* 700.

13. *Same.* A charge that the defendant willfully and unlawfully drew and issued warrants for costs "against the county of Davidson," etc., is bad, for the statute requires that warrants be drawn on the *County Trustee,* and not upon the *County.* *Id.*

14. *Same.* A charge in an indictment that the defendant, as Judge of the

County Court, did willfully and unlawfully draw and issue *warrants* against the county, etc., is bad, because it charges two or more offenses in the same count. The drawing of each warrant was a separate and substantial transaction, and a criminal prosecution would lie for each if the drawing was willfully and illegally done. *Id.*

15. *Robbery. Indictment.* An indictment for robbery under the Code is good, which charges the offense in the words of the statute defining the offense. *State* v. *Swafford*, 162.

16. *Grand Jury. Inquisitorial powers. Selling liquor to students.* The grand jury have inquisitorial powers in cases of selling liquors to students, of any educational institution, without consent of parent or guardian. *State* v. *Estes*, 168.

17. *Libel. Corporation indictable.* A corporation may be indicted for libel. *State* v. *Atchison, Buck and Nashville Banner Publishing Co.*, 729.

18. *Indictment. Joinder of different persons in different counts.* An individual and a corporation may be joined in the same indictment for libel, in different counts, the subject matter being of the same nature, and admitting of the same plea. *Id.*

19. *Perjury. Indictment.* An indictment for perjury is sufficient which sets out the court in which the alleged false oath was taken, that the oath was administered by a person authorized, and that deseribes the judicial proceedings in which the oath was taken and testimony given, and that the matter alleged to be false was material. *Lawson* v. *State*, 309.

20. *Perjury. Indictment.* In an indictment for perjury, which is assigned upon the swearing of the defendant as a witness in a criminal case, it need not be alleged that the case in which the false swearing occurred was by indictment or presentment; it is sufficient if it avers that the court had jurisdiction of the issue. *State* v. *Wise*, 38.

21. *Section* 4888 *of Code obsolete. Lawful for a white man to play cards with a free negro.* Section 4888 of the Code, making it a misdemeanor for a white man to play cards with any slave or free negro, is obsolete. The evil intended to be remedied has passed away with the emancipation of slavery. *Wells, Nanny and Howard* v. *State*, 70.

22. *Special term of the court. Offenders may be indicted and tried.* Under the provisions of the Code which authorize the appointment of a special term "whenever it is necessary for the dispatch of business," and direct "that all business of every nature and kind shall be conducted as at the regular term," offenders may be indicted and tried at a special term of a criminal court. *Hall* v. *State*, 552.

23. *Arson.* The provisions of the Code in relation to arson and house-burning were not repealed by the act of 1865, ch. 5, sec. 4, which

only increased the penalties for the offense of burning a dwelling house, and certainly had no effect on those provisions of the Code which related to the burning of any other building than a dwelling house, as for example a store house. *Id.*

24. *Indictment. General Verdict.* Under an indictment containing two counts, one for burning a certain house, to-wit, a store house, under the Code, section 4666, and the other for burning a valuable building, to-wit, a store house, a general verdict assessing a punishment within both sections will be good, although the minimum punishment, by confinement in the penitentiary under one section may be greater by three years than the minimum punishment under the other. *Id.*

25. *Evidence. Conspiracy.* Under an indictment for the burning of a house, evidence is admissible of the organization of a company to rob and burn houses generally, if the particular act were done by that company in pursuance of the general design, although the selection of the house was made afterwards. *Id.*

26. *Same. Accomplice. Corroboration.* Evidence is admissible of facts tending to corroborate the testimony of an accomplice, although not otherwise directly bearing on the main fact tried. *Id.*

27. *Tippling. Incorporated institutions of learning. Repeal of the charter of a town. Effect on license granted.* The charter of the town of Hartsville was repealed. There was in the town an incorporated institution of learning. The defendant, a few days before the repeal, procured license to tipple for twelve months, and had his saloon in Hartsville. Upon the repeal of the charter he was indicted for tippling within four miles of an incorporated institution of learning, not within an incorporated town. Held, he was liable to conviction, notwithstanding his license had not expired. The grant of the privilege to tipple, which might be exercised within an incorporated town, irrespective of its proximity to incorporated institutions of learning, does not include the right to do so upon the repeal of the charter of the town, nor preclude the Legislature from repealing the charter of the town, or change the results of such repeal. *Johnson* v. *State*, 469.

28. *Wantonly defacing or injuring a dwelling house. Indictment.* In an indictment under section 4652 of the Code, for wantonly defacing or injuring a dwelling, the ownership of the property may be laid in the person in possession. *State* v. *Mathes & Mills*, 36.

CROP.

See GROWING CROP.

DAMAGES.

See RAILROAD, 1; CONTRACTS, 6; CHANCERY PLEADING AND PRACTICE, 18.

DEED.

See TAX SALE, 2.

Mistake in registration. Rights of purchaser at sale to enforce vendor's lien. *Case:* Alley sold and conveyed to Agnew and Haselton a half interest in certain tracts of lands. The deed was registered, but in the registration a mistake was made in this, that instead of conveying "the south-east quarter of section three," as in the deed, it conveyed as registered "the south-east quarter of section eleven." A bill was filed by Alley to enforce his vendor's lien, in which the description of the registered deed was followed. A decree for sale was had, and land sold and purchased by Whiteside. It was understood by all the parties that the south-east quarter of section three was sold. The proceeds of sale did not satisfy the decree. Afterward the error in registration was discovered and correction made. Haselton, upon finding the mistake, purchased Agnew's interest, and upon execution being issued for balance of unpaid purchase money due Alley, the south-east quarter of section three was sold, and he became the purchaser. Held, that as Alley's deed to Agnew and Haselton conveyed to them this quarter section, and Alley had enforced his lien on all the land conveyed, that he never claimed and never had any title to the south-east quarter of section eleven, and as the incorrect description did not mislead any one, but all understood it as referring to section three actually conveyed, and not to section eleven, that Whiteside the purchaser was entitled to the south-east quarter of section three as against Haselton. It might be different as to a bona fide purchaser without notice. *Gaskill* v. *Badge & Eaton*, 144.

DEED OF TRUST.

1. *Mistake. Amendment.* A debtor directed his attorney to prepare a deed of trust to secure certain creditors whose names were furnished the attorney; the deed was prepared, acknowledged, and accepted by the trustee. The next day it was observed that the attorney had omitted the name of one of the creditors, and an amended deed was executed, showing the facts, acknowledged and registered with the original deed of trust; *held*, that such an amendment could not be made after the acceptance of the deed, except by consent of the trustee and the beneficiaries. *Baker* v. *Harlan*, 505.

2. *Equity Jurisdiction. Mutual mistake.* In such a case a court of equity cannot correct the mistake, for it is not a case of mutual mistake. *Id.*

DEED OF TRUST—*Continued.*

3. *Construction.* By a trust assignment of land, which authorized the assignee to sell for cash, and after paying expenses to apply the proceeds to the satisfaction of the debt secured, the grantor added: "And in the event a sale is made, I hereby waive the right of redemption given me by law, and in the event a sale is made the said grantee agrees, in consideration of the waiving of the right of redemption, to make the land bring as much as $4,000." Held, that the grantee was not bound to make the property bring that price unless he made the sale free from the equity of redemption. *Ordway* v. *White*, 537.

DIVORCE.

See COMITY OF STATES, 1.

DRUGGIST.

See CRIMINAL LAW, 4.

EJECTMENT.

See PROCESSIONING ACT; CHANCERY PLEADINGS AND PRACTICE, 2 to 4.

Ejectment. Description of the land. It is error for the court to charge in an action of ejectment, that "the jury may correct errors in the calls of the declaration by the proof, in the same way that a grant may be corrected by reference to the plat and certificate." A plaintiff cannot sue for one tract of land, and upon proof, recover a different tract. The declaration must describe the land with substantial accuracy. *Pyatt* v. *Gallaher*, 286.

ELECTION.

Sheriff. Costs. A defeated candidate for sheriff, who at the first circuit court after the election contests the election of the successful candidate, under the Code, sec. 889, may rely upon matter which simply goes to the disqualification of the defendant, with matter which tends to establish his own election; but if he fail in establishing his own right to the office he must pay, as the unsuccessful party, the costs of that branch of the contest, while entitled to recover costs on the other branch if decided against the defendant. *Lewis* v. *Watkins*, 174.

EQUITY OF REDEMPTION.

See CHANCERY PLEADINGS AND PRACTICE, 9.

1. *Rights of purchasers. Creditors.* A purchaser of an equity of redemption takes just such interest as the debtor had, to-wit, the right to redeem the land from the original purchaser, or any subsequent redeeming creditor, for two years from date of sale, and until it

EQUITY OF REDEMPTION—*Continued.*

is exercised any judgment creditor has the right to redeem from the last redeeming creditor. *Bank* v. *Ridgway*, 623.

2. *Proceedings to sell the equity of redemption. Effect of.* During the pendency of a suit by a creditor to force a sale of the debtor's right of redemption, any other creditor may redeem, and is not thereby postponed. *Id.*

ESCROW.

See CLERK AND MASTER, 2.

EVIDENCE.

See PARTNERSHIP, 3; CRIMINAL LAW, 5; PLEADINGS AND PRACTICE AT LAW, 3; HUSBAND AND WIFE; CHANCERY PLEADINGS AND PRACTICE, 23, 24, 25.

1. *Impeaching witnesses confined to general character.* It is error to permit an impeaching witness, over the objection of the opposite party, and, on direct examination, to prove as a fact that a female witness, sought to be impeached, had had bastard negro children. *Merriman* v. *State*, 393.

2. *Lost or destroyed instrument. Copy prima facie evidence. When.* In a suit upon a constable's bond against the sureties, a copy of the bond, certified by the clerk of the county court, by his deputy, to be a true and correct copy, as it appears of record and on file in his office, and produced by the clerk of the circuit court from a file of papers in his office, in a suit against the same sureties, in which a final judgment had been pronounced, is *prima facie* evidence of the bond, and that it was duly executed, acknowledged and recorded by the county court, it having been first shown that the records and papers of that court for the year in which the bond was given, and for several years immediately preceding and following, were lost or destroyed, and the defendants admitting by their pleadings that they did sign the bond. *Amis* v. *Marks*, 568.

3. *Constable's bond. Securities bound, though not acknowledged in open court.* A constable's bond is good, although not acknowledged by the obligors in open court, and if delivered, accepted, recorded and filed, the proof necessary to avoid it as an escrow must be as clear, satisfactory and demonstrative as that required to set aside a decree or judgment of a court of record on the ground of fraud. *Id.*

4. *Same. Agreement between principal and sureties will not affect rights of public.* A private agreement between the surety and principal of an official bond in the nature of a condition, will not affect the rights of the public, when the bond has been accepted by the proper

authority without notice of the condition, especially if there be nothing on the face of the bond to excite suspicion. *Id.*

5. *Positive and Negative Testimony.* If two persons, parties to a transaction, are called to testify and the one swears positively that it did transpire and the other as positively that it did not, the testimony of each is positive and the question is then one of credit, and the rule of law as to positive and negative testimony does not apply. *Williams* v. *John Kirkman and Union Bank*, 510

6. *Insurance.* The declarations of a person insured for the benefit of another, made before or after the insurance and not a part of the *res gestæ*, are not competent evidence upon a suit to recover the amount of the policy. *Mobile Life Insurance Co.* v. *Morris*, 101.

7. *Burden of proof.* When the question is, whether the answers of the insured were false or fraudulent, the burden of proof is on the insurer. *Id.*

EXECUTION.

See ACTIONS, 1; JUDGMENTS, 2; CHANCERY PLEADINGS AND PRACTICE, 11; STAY OF EXECUTION.

1. *When functus officio.* An execution issued by a Justice of the Peace and placed in the hands of an officer and upon which he has made endorsements, cannot be certified to a different county and execution issued thereon. When an execution is placed in the hands of an officer, it constitutes an order on him to execute it as therein commanded, and to return it to the office from which it issued, with his endorsement thereon, and it is then *functus officio.* *Paine* v. *Hoskins and Hoskins* v. *Paine*, 284.

2. *Levy. Legal title.* C., as a creditor, redeemed land sold by a trustee. After redemption, but before conveyance to C. by trustee, S. levied an execution against C. thereon. Held, the legal title not being in C. at the time of levy, no lien was thereby acquired. *Springer Smith*, 737.

EXECUTOR.

See APPEAL, 1.

EXEMPTION.

See PLEADINGS AND PRACTICE AT LAW, 13.

Partnership property. Partnership property is not exempt in the hands of one member of the firm who is the head of a family. *Spiro* v. *Paxton*, 75.

FERRY BOAT.

Not a fixture of the realty, though connected to land by a chain. Lien for purchase money lost by destruction. A ferry boat with a chain and buoys, etc., is not a fixture of the realty, although the chain by which it is run is fastened to the boat and to an island in the river—and hence a registered lien for purchase money is lost as to such property, by their destruction, and does not extend to a new boat and appurtenances substituted in place of the one destroyed or worn out. *Cowart* v. *Cowart*, 57.

FIXTURE.

See FERRY BOAT.

FRAUD.

See MORTGAGE, 3.

FRAUDULENT CONVEYANCE.

See CHANCERY PLEADINGS AND PRACTICE, 5.

FUTURES.

See CONTRACT, 3.

GUARDIAN AND WARD.

1. *Land purchased with Ward's money. Election to take land or money. Claim superior to Homestead right.* An infant, whose money has been used by the guardian in paying for land bought in his own name, may follow the money into the land, and elect to take the land, or have the money declared a charge upon the land, and the land sold for its satisfaction; and the infant's claim will be superior to the guardian's right of homestead in the land. *Gordon* v. *English and Hays*, 634.

2. *Same. Priority of bona fide mortgagee. Pre-existing debt.* As between an infant, whose money has been used by the guardian in paying for land, and a *bona fide* mortgagee of the land, without notice of the infant's equity, for a consideration passing at the time, the mortgagee will have the better right, and will be entitled to the security even for a preexisting debt included therein, if the new advance was made for the purpose of obtaining the additional security for the antecedent debt, and the new consideration forms a substantial part of the debt secured. *Id.*

GROWING CROP.

Purchaser. Judgment Creditor. An instrument which conveys so much of the grantor's growing crop of cotton as will be sufficient to make two bales of lint cotton, each weighing not less than 500 pounds, the same to be gathered, prepared for market, and delivered by the grantor to the grantee by the first of the succeeding December,

passes no title to any of the cotton as against a judgment creditor of the grantor who levies his execution on seed cotton in a pen, part of the crop, before the first of December, and the mere intention of the grantor, not communicated to the grantee or the creditor before the levy, to gin, bale and deliver the particular cotton to the grantee, will not change the result. *Williamson* v. *Steele*, 527.

HOMESTEAD.

See PARTNERSHIP, 1; GUARDIAN AND WARD, 1.

1. *Fraudulent Conveyance.* A wife is entitled to a homestead out of lands fraudulently conveyed to her by the husband for the purpose of hindering and delaying his creditors. *Ruohs* v. *Hooke*, 302.

2. *Tenants in common.* The homestead right does not exist where the occupant has only an individual interest as tenant in common with others. *Avans* v. *Everett*, 76.

3. *Legal estate may be levied on and sold.* The legal estate of the head of a family in land set apart to him as a homestead may be levied on by execution and sold subject to the homestead right. *Gilbert* v. *Cowan, McClung & Co.*, 203.

4. *Purchase money.* Under the homestead law of this State the homestead may be subjected to the satisfaction of a debt contracted for the purchase of the land in which the homestead right has been acquired, although the debt may have been changed in form by a new note with personal security, and at a higher though legal rate of interest, and although all the residue of the land has been taken by a creditor against whom the homestead exemption was effective. *Bentley* v. *Jordan*, 353.

5. *Same.* The purchaser of land at a master's sale, under a decree enforcing a vendor's lien, paid to the master on his purchase notes the amount required to satisfy the vendor's lien and costs of suit, and executed to the defendant, who was entitled to the residue of the purchase money, a new note for such residue on time, with personal security, and at a higher though legal rate of interest, after which the land was seized by attachment in favor of a general creditor, against whom the homestead exemption was good, and then by the payee of the new note. Held, that the latter could subject the homestead to the satisfaction of the debt for the purchase money, although the general creditor had a prior lien on the residue of the land, the proceeds of such residue being insufficient to satisfy both debts. *Id.*

6. *Chancery practice and pleadings. Sale free from equity of redemption.* When the homestead cannot be set apart, and it becomes necessary for a court of chancery to sell the land for the payment of debts,

HOMESTEAD—*Continued.*

the court may order the sale upon the terms of the payment of $1,000 in cash for reinvestment in a homestead, and the residue in instalments on time, in accordance with the statute, free from the equity of redemption. *Id.*

HUSBAND AND WIFE.

See ADMINISTRATION, 1

May be witnesses. When. Where husband and wife are parties to a suit, they are competent to testify for and against each other except as to facts acquired by virtue of their relation as husband and wife. *Orr* v. *Cox*, 617.

INCORPORATED INSTITUTIONS OF LEARNING.

See CRIMINAL LAW, 10, 27.

INJUNCTION.

See CHANCERY PLEADING AND PRACTICE, 2, 18; PARTNERSHIP, 3.

INNOCENT PURCHASER.

1. *Weakness of body and mind. Undue advantage. Innocent purchaser will be protected. When.* If a grantor have sufficient capacity to make a conveyance of property, and only undue advantage be taken of his weakness of body and mind, a subsequent innocent purchaser from the grantee, after the lapse of twelve years without any steps taken by those interested to set aside the conveyance, would acquire the legal title, and a superior equity to the equity of the aggrieved parties. *Moore* v. *Walker*, 656.

2. *Notice.* Language in a deed which admits of a construction consistent with the title, will not be notice to an innocent purchaser of an outstanding equity. *Id.*

INSURANCE.

See EVIDENCE, 6.

JUDGMENT.

1. *Barred by statute of limitation of ten years.* Judgments of a justice of the peace, as well as judgments of a court of record, are barred by the statute of limitations of ten years. *McGrew* v. *Reasons*, 485.

2. *Same. Execution. Certiorari and supersedeas.* Execution based upon such a judgment of the justice of the peace may be quashed in the circuit court upon petition for *certiorari* and *supersedeas*. *Id.*

JURY.

See CRIMINAL LAW, 16.

JURIES

See PLEADINGS AND PRACTICE AT LAW, 12.

JUSTICE OF THE PEACE.

See ABATEMENT; APPEAL, 2, 3; EXECUTION, 1.

Jurisdiction. Endorser. Under the Code, sec. 4123, sub-sec. 2, justices of the peace had jurisdiction of endorsements of negotiable paper, on which demand and notice were not waived, to the extent of $250. *Redd* v. *Brown*, 615.

LANDLORD AND TENANT.

1. *Rent. Supplies.* A landlord, in a suit to enforce his lien on the tenant's crop, may join demands for rent and supplies which are a lien on the same crop, but he must give the amount of each demand constituting the aggregate sum sued for. *Dougherty* v. *Kellum*, 643.

2. *Attachment. Affidavit.* It is no ground for quashing the attachment in such case, that the affidavit fails to specify the form of the demand, whether note or account, nor that the amount of the debt claimed is qualified by the words "more or less." *Id.*

3. *Same. Same.* But the affidavit on which an attachment is sought for supplies furnished by the landlord, must state that an account of those supplies was kept as the articles were furnished, and the account must be sworn to before or at the time of suing out the attachment. Any note or written memorandum, even on a loose sheet of paper, if made at the time the articles were furnished, would meet the requirements of the act. *Id.*

LEVY.

See CERTIORARI AND SUPERSEDEAS, 1.

LIVERY STABLE KEEPERS.

See REVENUE LAW, 2.

LIBEL.

See CRIMINAL LAW, 17.

LICENSE.

See CRIMINAL LAW, 4; REVENUE LAW, 2; PATENT RIGHTS.

Privilege. Wagon. A farmer who, after laying by his crop, used his farm wagon with a team of two horses to haul wood for a money consideration, is not required to take out a transfer license, under the act of 1868. ch. 79, sec. 5, and subsequent acts in *pari materia*. *Gardner* v. *Lewis*, 195.

LIEN.

See CERTIORARI AND SUPERSEDEAS, 1; EXECUTION, 2; FERRY BOAT; HOMESTEAD, 5; MARRIED WOMEN, 6; PLEADINGS AND PRACTICE AT LAW, 5; CHANCERY PLEADINGS AND PRACTICE, 13, 21.

1. *Vendor's. Statute of Limitations.* A third person to whom a portion of the purchase money of land is, by the terms of the grantor's deed, to be paid by the vendee, has, in the absence of an express reservation of lien, the vendor's lien or equity on the land for the payment of the money, but the lien will be barred by the continuous possession of the land by the vendee for seven years from the maturity of the debt. *Thompson* v. *Thompson*, 126.

2. *By assignment and by legal proceedings. Priority.* In a contest between creditors claiming under a direct assignment to them by the debtor, and other creditors who had acquired a lien on the property by legal proceedings, the latter will have the better right, where, although the deed of assignment was registered, the assignee creditors had no notice of its existence until four years after the registration, and two years after the other creditors had acquired their lien, and then accidentally by finding the assignment on the register's book. *McEwen & Tompkins* v. *Bamberger, Bloom & Co.*, 576.

LIQUORS.

See CRIMINAL LAW, 4.

LOST INSTRUMENTS.

See EVIDENCE, 2.

MARRIED WOMEN.

See HOMESTED, 1; HUSBAND AND WIFE; MORTGAGE, 1

1. *Marriage Contract. Effect of its not being Registered.* A marriage contract, not registered in a county to which the husband removes is, under act of 1831, Code, sec. 2035, void as to creditors of the husband, and gives no protection to the property against legal process on the part of such creditors. The contract is good, however, between husband and wife, and the property does not vest absolutely in him, if it be personalty. It is only not protected as against creditors. *Cowan, McClung & Co.* v. *Mann*, 229.

2. *Same. Chose in action.* To be subject, however, to the creditors, if a chose in action, the proceeds must be reduced to possession of the wife, and be in possession of husband when the process attaches to or is fastened on it. If the wife has money in her hands, proceeds of her real estate, and loans it to a firm of which her husband is a member, taking notes for it, this debt cannot be subjected to her husband's creditors. It is a chose in action not reduced to possession in that form. *Id.*

MARRIED WOMEN—*Continued.*

3. *Same. Same.* So also a debt purchased by the wife with her money, arising from her separate estate, is not subject to her husband's creditors. *Id.*

4. *Same.* The wife held entitled to receive proceeds of trust property conveyed by husband's firm to secure re-payment of money loaned to firm, under facts of this case. *Id.*

5. *Receipt for funds arising from sale of land.* Where a married woman goes in person and, with her husband, gives a receipt for her share of the proceeds of land sold by decree of court for division, and directs the money to be credited on the husband's notes as purchaser at the sale, she has received the money in person within the meaning of the Code, section 3319, although no money was in fact counted out to her; and, nothing further appearing, she will thereby acquire no interest in the land as against the husband's creditors, especially if the facts be reported to the court and confirmed. *B. A. Ezell* v. *John D. Wright*, 512.

6. *Vendor's Lien.* If a married woman buy land, partly for cash and partly on time, and accept a deed of conveyance to her separate use, retaining a lien for the time instalments, she cannot have the money which she has paid refunded merely because of her coverture, and the lien reserved for the payment of the purchase money may be enforced in equity. *Jackson* v. *Rutledge*. 626.

MINORS.

See CONTRACTS, 5, 6.

MISTAKE.

See DEED; DEED OF TRUST, 1.

MORTGAGE.

See GUARDIAN AND WARD, 2.

1. *Valuable consideration. Purchaser for value.* A mortgagee for a valuable consideration passing at the time is, to the extent of the consideration, a purchaser for value. *Moore* v. *Walker*, 656.

2. *Voluntary.* A person *sui juris* conveyed his property by voluntary deed to his mother, upon a recital that his habits were such as to disqualify him from managing his property in a prudent and discreet manner, and that the income was sufficient for his support, in trust to permit him to receive the annual income arising therefrom during his life, and at his death the same to be at the absolute disposal of his mother, "or to those who would be entitled to the same under the statute of distributions from her." Some years afterwards, the mother, on her death-bed, re-conveyed the property to her son. Held, that he took a good title. *Id.*

MORTGAGE—*Continued.*

3. ***Right of Action. Statutes of Limitation.*** Under the act of 1850, ch. 36, brought into the Code, sec. 2481, a wife who married before the passage of the act, became entitled to sue for and recover in her own name in equity her land of which she and her husband had been previously disseized by a third person, but not for the time required to create the bar of the statute of limitations against the joint right of action of the husband and wife, and the separate right of action thus given by the statute would not be barred during the coverture. *Id.*

NON-RESIDENT.

See CHANCERY PRACTICE AND PLEADINGS, 14, 26.

Ignorance of law. A citizen of another State, who is a party to a suit in this State, and appears by counsel from its inception, cannot claim an election in the mode of trial, based upon his ignorance of the law of this State. *Coulter* v. *Sewing Machine Co.*, 115.

NEGLIGENCE.

See BILLS AND NOTES.

NOTICE.

See MORTGAGE, 4; PROCESSIONING ACT, 1.

PARTNERSHIP.

See CHANCERY PLEADINGS AND PRACTICE, 24, 25; EXEMPTION, 1.

1. ***Assets. Creditors. Homestead.*** The creditors of a firm have the right to follow the firm assets into land bought with the purchase money of other land in which the assets were first invested, and the partner making the investment cannot claim a homestead exemption in such land as against the firm creditors. *Chalfant* v. *Grant*, 118.

2. ***Suit by. Injunction bond. Surety. Indemnity of surety. Agreement. Burden of proof.*** One of two persons, late partners, who had united in a bill to enjoin the collection of a partnership debt, and in giving the injunction bond, procured the surety to the bond, and to indemnify him against the loss, agreed to transfer, and did afterward transfer, for his benefit, the balance due upon a note given to him by the surety for land, but subsequently authorized the surety to pay out of such balance a judgment against him as a prior encumbrance on the land, after which he became insolvent; the bill was dismissed, and the other partner paid the judgment rendered against them for the debt enjoined, and filed this bill to hold the surety liable for the indemnity. Held, that the transfer itself gave him no cause of action; that the burden of proof—the facts on which his equity rested being denied by the answer—is on him to show an agreement that the indemnity was to enure to his benefit;

PARTNERSHIP—*Continued.*

that representations of the copartner and surety in the nature of expressions of opinion, not of contract, nor intended to influence his action except in the way of persuasion, would not entitle him to relief; and that the payment of the alleged judgment, if made in good faith, would, probably, in any event, protect the surety, there being to that extent a failure of the original consideration of the note. *Akin* v. *Bingham*, 317.

PATENT RIGHT.

Sale of. Not subject to license tax. The State has no right to require a license in order to a sale of the right to make and manufacture a patented article. *State and Meigs county* v. *Butler*, 222.

PERSONS UNDER DISABILITY.

See CHANCERY PLEADING AND PRACTICE, 20; INNOCENT PURCHASER, 1.

PLEADINGS AND PRACTICE AT LAW.

See ABATEMENT; CRIMINAL LAW, 1; SUPREME COURT, 1.

2. *Amendment of declaration. Statute of Limitations.* Where the action was in detinue and the declaration in trover, it is not reversible error in the trial court to refuse an application by the plaintiff to amend his declaration by a count on the facts of the case for neglect, upon the objection of the defendants that the new cause of action was barred by the statute of limitations. *Trousdale* v. *Thomas*, 715.

3. *Affidavits.* If the defendant offer as evidence the affidavits of the plaintiff, in relation to the demands in suit, for the purpose of having the benefit of the plaintiff's receipts of other demands written on, and expressly referring to the affidavits for the description of the demands for which the receipts were given, it is not error to charge that the affidavits were not evidence of the truth of their contents, but only evidence of the fact that the plaintiffs made the claims therein set forth. *Id.*

4. *Seizure by military authorities. Appointment of agents, by the State officers, to examine assets of the Bank, under act of the Legislature, not conversion.* The States of Tennessee and Georgia were, in the spring of 1865, so far in a state of war that the seizure by the military authorities of the United States of the effects held by the officers of the Bank of Tennessee, deprived those officers of all control over the same, and vested the executive officers of the State of Tennessee, to whom the military authorities surrendered the effects for the State, with authority to safely keep them until the Legislature should direct what disposition should be made of them, and the possession of the State officers afterwards under an order of the

Legislature to take charge of and examine the effects, and the employment of agents to make an examination and schedule thereof, under an act of the Legislature, would not be a conversion, either in the State officials or the agents. And an order by the Legislature to take charge of and examine the assets of the Bank of Tennessee, would include special deposits. *Id.*

5. *Lien on boats. Suit to enforce is a suit at law.* A suit to enforce a lien on a steamboat, under the Code, sec. 3550 *et seq.*, is a suit at law, and in the absence of a bill of exceptions, the findings of the court on the facts is conclusive. *Ferguson* v. *Vance & Kirby*, 90.

6. *Same. Replevy bond. Amount to be recovered.* Where in such a suit by one claimant the steamboat is attached, and at once replevied by a bond payable to that claimant, in the penalty of double the amount of his claim, conditioned to abide by and perform the judgment of the court if rendered in favor of that claimant to enforce his debt upon the boat, the obligors are only bound, to the extent of the penalty, for the judgment in favor of that claimant for debt and costs, and the boat is released. *Id.*

7. *Same. Code sec.* 3558 *construed.* The prohibition of the Code, sec. 3558, that after a warrant and seizure of the boat at the suit of one creditor, no other creditor shall have a warrant to attach the boat, applies only while the steamboat is in the custody of the law under the first attachment; and if the boat be released by replevy, any creditor may, either in that or another suit, sue out a warrant of seizure. *Id.*

8. *Same. Amount of bond. To whose benefit it enures.* The boat cannot be replevied except by giving a bond in the penalty of double the amount of the claimants then in the suit, and such a bond would enure to the benefit of such claimants equally. *Id.*

9. *Same.* The remedy for non-compliance with any of the requisites to the making of a claimant a party is by motion to take the papers off the file, not by demurrer to the declaration. *Id.*

10. *Same. Wages. Recovery of judgment no waiver of lien.* A claim for wages as an engineer or hand, being for work and labor done, is good on demurrer, and a recovery of judgment on a claim is no waiver of the statute lien. *Id.*

11. *Same.* If the account made an exhibit to the petition of a claimant against a boat give the dates of the items, showing that they were within the three months, a motion to dismiss the petition because it fails to state the fact will not lie. Nor is a petition multifarious because, while proceeding against the owners of the boat upon a a debt contracted by them, it mentions an account against a previous owner. *Id.*

PLEADINGS AND PRACTICE AT LAW—*Continued.*

12. *Right to jury waived by cause remaining on non-jury docket.* Although a party to a suit brought into the circuit court by appeal from a justice, enter of record a demand for a jury trial, he may waive that right by allowing the case to remain on the non-jury docket, and failing to call the attention of the court to his demand at the proper time. *Coulter* v. *Weed Sewing Machine Company*, 115.

13. *Supersedeas to quash levy. Exempt property. Lien on a note.* Upon the supersedeas of a justice's execution to quash a levy on exempt property, the defense was that the debtor had given the creditor a lien on the property by the note on which the judgment was rendered; whereupon the debtor filed an amended petition, alleging that the provision of the note giving a lien was inserted by the creditor withaut his knowledge. Held, that the whole litigation should be tried in one forum, and the creditor was given his election to withdraw all objection to the jurisdiction of the court of law over the matter of the amended petition, or to have the levy quashed without prejudice to his remedy in equity. *Mynatt* v. *Magill*, 72.

PRINCIPAL AND SURETY.

See ACTIONS, 4; ADMINISTRATION, 6; CERTIORARI AND SUPERSEDEAS, 1; CLERK AND MASTER, 1; SUMMARY PROCEEDINGS, 1, 2; CHANCERY PLEADINGS AND PRACTICE, 26; EVIDENCE, 4; PARTNERSHIP, 2.

1. *Sureties. Not discharged by agreement for delay after judgment.* After judgment an agreement between creditor and principal for delay, even for a valuable consideration, will not discharge sureties, for the sureties may have judgment over against the principal, and proceed to make the money, notwithstanding the agreement between the creditor and principal. *Stockard* v. *Granberry*, 668.

2. *Are discharged when creditor obstructs their remedy.* But if, after judgment and issuance of execution, the creditor takes a deed of trust from the principal on his property, and includes other debts due him and other persons, to be paid before the judgment, the sureties will be discharged, for thereby he covers up the property of the principal and obstructs the remedy of the sureties. *Id.*

3. *Stayor. Entitled to same defense as sureties.* A stayor is a surety for the payment of the judgment, and is entitled to the same defenses as the sureties. *Id.*

PROCESSIONING ACT.

Notice. In proceedings under the processioning act, all parties interested must have notice. It is therefore error to admit the proceedings as proof in an action of ejectment, where the widow of a deceased claimant gave notice, but the heirs had no notice. *Pyatt* v. *Gallaher*, 286.

RAILROAD.

1. *Action. Damages.* For land appropriated for the building of a railroad chartered under the general law since the Constitution of 1870, the owner may commence suit by petition for a jury of inquest, or he may bring an action on the facts of the case to recover the value of the land and damages. *Duck River R.R.* v. *Cochrane*, 478.

2. *Quantity of land appropriated.* The entry and construction of the road without taking any steps to condemn the land, will be regarded as an appropriation of so much of the land as the law authorized. *Id.*

3. *Same. Description of land by jury. When sufficient.* The description of the land by the jury as fifty feet from the center of the railroad track on each side is sufficient. It need not be by metes and bounds. The road-bed is a permanent land mark, and fifty feet from the center may be rendered certain. *Id.*

RECEIVER.

See CHANCERY PLEADINGS AND PRACTICE, 1

RECORDER.

See TAXES, 7.

REDEMPTION.

See EXECUTION, 2; EQUITY OF REDEMPTION, 2.

REGISTRATION.

See DEED.

RENTS.

Attachment. Plaintiff rented defendant land for one-third of the crop. Owing to bad cultivation only three bales of cotton was raised. Plaintiff attaches *all* the cotton, and the court renders judgment for rent, estimating what might have been raised by good husbandry. Held, erroneous. Damages for breach of contract cannot be enforced by attachment under sections of the Code giving attachments for rent. *Patterson* v. *Hawkins*, 483.

REPLEVIN.

See ABATEMENT; PLEADINGS AND PRACTICE AT LAW, 6.

Bond. Judgment thereon. A replevin bond, conditioned in the sum of $2,000 "to produce the property, if demanded, in as good condition as it then was, and deliver it to the proper officer of the court," will be regarded as a bond in double the value of the property, conditioned to pay its value and interest in the event defendant be cast in the suit, and the proper judgment thereon is for the penalty of the bond, which may be satisfied by the delivery of the property or payment of its value. *Kuhn and Shields* v. *Spellacy*, 278.

REVENUE.

1. *Laws. Construction.* A safe and sound rule of construction of revenue laws is to hold, in the absence of express words disclosing a different intent, that they were not intended to subject the same property to be twice charged for the same tax, nor the same business to be twice taxed for the exercise of the same privilege. *Bell* v. *Watson*, 328.

2. *License Tax. Livery Stable Keepers. Buggies.* Where, therefore, a revenue law declared the business of carrying on a livery stable to be a privilege, for the exercise of which a license tax was imposed, and also made the running of "hacks, carriages, and wheeled vehicles" for profit, a privilege subject to a license tax, it was held that a livery stable keeper who had been duly licensed for the year, could not be required to pay a license tax on each buggy used in his business, the proof showing that the letting of buggies for hire was a part of the business of a livery stable. *Id.*

3. *Officer. Bond.* Any revenue officer failing to file his bond in the time prescribed by law, vacates his office by such failure, and if he perform any official act without having first given bond, he is liable to criminal prosecution. *State* v. *Goddard*, 99.

4. *Revenue.* The term "revenue" includes not only money raised by some of the modes of taxation, but in one sense all money belonging to the State. *Donelson* v. *State*, 692.

SALE OF LAND.

See CHANCERY PLEADING AND PRACTICE, 7, 9; CONTRACTS, 2; DEED; MORTGAGE, 1; MARRIED WOMEN, 5; TAXES, 1.

SEPARATE ESTATE.

See TENANT BY CURTESY.

SHERIFF.

See ELECTION.

STATE PARTY TO SUIT.

See CHANCERY PLEADING AND PRACTICE, 12.

STATUTES CONSTRUED.

Act 1865, ch. 5 555
" 1870, ch. 80 358
" 1871, ch. 62 650
" 1873, ch. 118 329
" 1875, ch. 116 644
" 1875, ch. 81 688
" 1877, ch. 3 400
" 1877, ch. 97 597
" 1879, ch. 200 622

STATUTES CONSTRUED—*Continued.*

Act 1879, ch. 127..... 80
" 1879, ch. 97 197
" 1879, ch. 210..... 377
" 1879, ch. 101..... 466
" 1879, ch. 232..... 477

STATUTE OF LIMITATIONS.

See CHANCERY PLEADINGS AND PRACTICE, 6, 17; JUDGMENTS, 1; LIEN, 1; MORTGAGE, 5; PLEADINGS AND PRACTICE AT LAW, 2.

STAY OF EXECUTION.

When a stay is entered by consent of plaintiff after the time within which the privilege is granted by statute to stay the issuance of execution has expired, it operates to prevent the issuance of execution on the judgment for eight months from the *time the stay was entered*, and not eight months from the rendition of the judgment. *Hill* v. *Staples*, 271.

STAYOR.

See PRINCIPAL AND SURETY, 3.

Tender. The stayor of a justice's judgment is entitled to have the execution thereon superseded and quashed, where the principal debtor has made a legal tender of the amount due to the judgment creditor, who refused to receive it, and this without bringing the money tendered into court. *West and Farmer* v. *Gordon*, 370.

SUMMARY PROCEEDINGS.

1. *Motion will not lie against Constable and his sureties. When.* A motion will not lie against a constable and his sureties for money collected by the constable on a note, the amount due upon which at the time of collection was above the jurisdiction of a justice of the peace, although the constable gave a receipt for the collection of the note in his official capacity. *Kiggin* v. *Sharkey*, 707.

2. *Motion against securities on Trustee's bond, after death of principal.* Under the Code, section 735, a motion for the official default of the County Trustee as a revenue collector, will lie by the State against the sureties on his bond, where the Trustee dies before the motion is made or notice given. *Derrick* v. *State*, 396.

3. *Motion by the State. Circuit Court. Jurisdiction.* A motion by the State against the clerk of a criminal court and his sureties for a failure to pay over revenue, may be made in the circuit court. *Donelson* v. *State*, 692.

4. *Jail fees. Costs certified as required by statute is in the nature of a judgment.* If jail fees in felony cases are taxed to the county and *cer-*

SUMMARY PROCEEDINGS—*Continued.*

tified, as required by the statute, by the *Attorney-General* and *Judge* as *properly taxed*, and as costs accrued on *behalf of the county*, it is in the nature of a judgment, and the county not having appealed therefrom, the clerk, having collected such fees, will not be heard to object that the county was not liable for such fees. *Id.*

SUPREME COURT.

1. *Practice. Will not remand. When.* The Supreme Court, upon sustaining a demurrer to a bill, will not remand for the insertion of facts known to complainant at the filing of the bill, where the successful cause of demurrer was based on the absence of such facts, and the insufficiency in law of the statements actually made to authorize the relief sought. *McEwen* v. *Gillespie*, 204.

2. *Appeal from judgment by motion. Without bill of exceptions limited to errors assigned below.* Where the sureties of a special commissioner appeal from a judgment against them and their principal, by motion, on the commissioner's bond, without a bill of exceptions, the record showing that they appeared and made defense, they will be limited in their assignment of errors to the points of defense made in the court below.

SUPERSEDEAS.

See PLEADINGS AND PRACTICE AT LAW, 13.

TAXES.

See CONTRACT, 2; CHANCERY PLEADINGS AND PRACTICE, 9; REVENUE LAWS, 2; LICENSE; PATENT RIGHT.

1. *Privileges. Land sales.* The levy of a tax upon privileges in general terms by the county court does not embrace a tax upon land sales. *Clarke* v. *Montague & Case*, 274.

2. *Tax Sale. Collector's deed.* A tax collector's deed is not void which fails to recite that in selling the land the collector pursued the statute by offering first to sell a less quantity than the whole to whoever would bid the amount of the taxes on the smallest number of acres. *Brien & Woodard* v. *O'Shaughnesy*, 724.

3. *Same. Several lots sold as a whole.* A tax sale is not void because several town lots belonging to one owner, lying contiguous and forming one tract or body, were assessed, reported and sold as a whole instead of separately. *Id.*

4. *Same. Substitution of original for copy of collector's report.* The substitution of the original report of the collector for a copy, to accompany the order of sale, will not invalidate the sale. *Id.*

5. *Same. Return of order of sale.* The failure of the collector to make return of the order of sale in due time, as required by the statute, will not affect the right of the purchaser. *Id.*

TAXES—*Continued.*

6. *Same. Collector may make second deed with fuller recitals.* A deed by the collector made to the purchaser after the commencement of an action of ejectment, in confirmation of a previous deed, but containing fuller recitals, may be read in evidence, though it does not in terms refer to the first. *Id.*

7. *State. Trials by Mayor or Recorder.* Upon trials on warrants issued by a Mayor or Recorder for a violation of a town ordinance, the State is not entitled to the tax of $2. *State* v. *Mason*, 649.

8. *Same. Same.* Warrants issued by a Mayor or Recorder to recover penalties for violation of the ordinances of a town, are not State prosecutions, nor is such a trial a bar to a prosecution for an offense against the laws of the State committed by the same act. *Id.*

9. *Same. On Litigation. Must be paid first out of costs collected by the Clerk.* The claim of the State for taxes has precedence over a mere private debt, and if a clerk collects from the unsuccessful party a sum insufficient to pay all costs in a cause, but a sufficiency to pay the State tax, he should pay the State tax first, and officers and witnesses are not entitled to a *pro rata*. *State* v. *Stanley*, 524.

10. *Same. Officers and witnesses not required to refund. When.* If, however, the unsuccessful party should himself pay any officer or witness his own costs voluntarily, and as a payment of such specific costs, such officer or witness could not be required to refund such payment, that it might be applied to the payment of the State tax. *Id.*

TECHNICALITIES.

See CRIMINAL LAW, 11.

TENANTS IN COMMON.

See HOMESTEAD, 2.

TENANT BY CURTESY.

Separate Estate. The husband is entitled to be tenant by curtesy in his wife's separate real estate, notwithstanding he was cut off from any participation in the rents and profits during coverture, if there be no words in the instrument creating the separate estate clearly indicating a purpose to cut him off from the curtesy. *Carter* v. *Dale, Ross & Co*, 710.

TENDER.

See STAYOR.

TRUST.

See ADMINISTRANION, 4.

TRUSTEE.

See APPEAL, 4; SUMMARY PROCEEDINGS, 2.

TRESPASS.

See CHANCERY PLEADINGS AND PRACTICE, 2.

USURY.

See BANKS.

VENDOR.

See HOMESTEAD, 4; LIEN, 1.

VOID PROCEEDINGS.

See APPEAL, 5.

WARRANTS.

For State costs. So much of the second section of the act of the Legislature of 1879, ch. 101, as directs the Comptroller to issue warrants to chairman of the county court for costs chargeable to the State, to be paid into the county treasury, is inoperative and void *Pillow* v. *Gaines*, 466.

WILLS.

See CHANCERY PLEADING AND PRACTICE, 20.

1. *Construction.* Under a will written by an unlettered draftsman, by which the testator gives land equally to his sons and daughters as the specific objects of his bounty, and makes provisions which contemplate the keeping together of the property for the benefit of the sons and daughters and their children during the life of the sons and daughters, and even afterward, for the benefit of the wives of the sons, it was held that the legal title passes in trust for the benefit of the sons and daughters as long as the latter continue members of the family, for the life of the sons and daughters, and after their death to their children, and that the title of the parents is not subject to execution sale. *Wood* v. *Evans*, 543.

2. *Construction.* James Browder was the owner of a tract of land. He died leaving a will in which is the following clause: "After the death of my brother's widow, or any circumstances that will give me the right to said property, I wish the said plantation to be offered to my brother, Jephtha Browder, and my sisters, Jane Eldridge, Nancy Bowman, Juda Russell, Polly Jackson, Eliza Winton, or whichever one of them will take it and pay my executors four thousand five hundred dollars, and in default of any of them being unwilling to pay this sum for it, then my executors to put it up at public sale to the highest bidder, and of the proceeds of the sale in either case to give my said brother and sisters above named the sum of two hundred dollars, except Nancy Bowman, and to her three hundred dollars." Held, that this was not a devise of the land to the brother and sisters at their election, subject to a charge of $4,500,

but that a sale of the land was contemplated. If they accepted the offer they took it as purchasers. *Browder* v. *Jackson*, 151.

3. *Construction.* A father having only two children, a son and a daughter, the latter being of weak mind, sold to his son a tract of land for $7,500, taking his 75 notes for $100 each, payable at intervals of a year for 75 years, and on the same day made his will, by the third item of which he bequeathed as follows: "I also direct that my daughter, Mary Parsons, have seven thousand and five hundred dollars' worth of notes, or the proceeds of the same, that I now hold on Elijah P. Parsons, to be paid in different payments, the first note becoming due on the first day of May, 1862, for one hundred dollars, due on the first day of May in each year annually, until the above named sum is paid to her or the heirs of her body." Held that the notes themselves passed, under the will, to the daughter. *Parsons* v. *Kinzer*, 342.

4. *Same. Election by the Court.* The testator's son, to whom the residue of this estate was given by the will, having died leaving a wife and children, this bill was filed against his personal representative, widow and children, for a declaration and enforcement of the daughter's right. Held that complainant had a lien on the land for which the notes were given for their payment, which was fixed by the filing of the bill; that, whether any children she might have were entitled to an interest in the legacy or not, complainant might have the value of the notes realized under the Code, sections 3328, 3719; that it was manifestly to the interest of the infant children of the son, that this value should be fixed upon the land in lieu of the 75 years annual payment of $100 cash, and the court would so elect for them, and that the enforcement of the debt might be suspended to suit the convenience of the parties by the payment of interest. Held, also, that while the son's widow, to whom a part of the land might have been allotted in dower, could not be affected by this change, she would be bound to keep down her proportion of the annual burden of $100, during the existence of the dower estate. *Id.*

WITNESSES.

See CONSTITUTIONAL LAW, 8; COSTS, 3.

Compensation. Must be paid by the County. When. The compensation of witnesses examined by the Grand Jury in support of an indictment which they ignored, must be paid by the County, not the State. *Treadway* v. *Thompson*, 55.

WRIT OF ERROR.

See APPEAL, 4.

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